SUPREME COURT
OF THE UNITED STATES

No.	09-1476
Title	Borough of Duryea, Pennsylvania, et al., Petitioners v. Charles J. Guarnieri
Docketed	June 4, 2010
Lower Ct.	United States Court of Appeals for the Third Circuit
Case Nos.	(08-3949, 08-4428)
Decision Date	February 4, 2010
Rehearing Denied	March 4, 2010
Questions Presented	

---Date---	--------Proceedings and Orders----------
Jun 2 2010	Petition for a writ of certiorari filed. (Response due July 6, 2010)
Jun 23 2010	Order extending time to file response to petition to and including September 7, 2010.
Jul 6 2010	Brief amicus curiae of Pennsylvania State Association of Boroughs filed.
Sep 7 2010	Brief of respondent Charles J. Guarnieri in opposition filed.
Sep 21 2010	Reply of petitioners Borough of Duryea, Pennsylvania, et al. filed. (Distributed)
Sep 22 2010	DISTRIBUTED for Conference of October 8, 2010.
Oct 12 2010	Petition GRANTED.
Oct 19 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Oct 21 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 9 2010	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 6, 2010.
Nov 9 2010	The time within which to file respondent's brief on the merits is extended to and including January 18, 2011.
Dec 6 2010	Joint appendix filed. (Statement of costs filed)
Dec 6 2010	Brief of petitioners Borough of Duryea, Pennsylvania, et al. filed.
Dec 13 2010	Brief amicus curiae of the United States filed.
Dec 13 2010	Brief amici curiae of Florida, et al. filed.
Dec 13 2010	Brief amicus curiae of State and Local Legal Center filed.
Dec 13 2010	Brief amicus curiae of National School Boards Association filed.
Dec 23 2010	SET FOR ARGUMENT ON Tuesday, March 22, 2011.
Jan 14 2011	CIRCULATED.

Jan 18 2011	Brief of respondent Charles J. Guarnieri filed. (Distributed)
Jan 24 2011	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 24 2011	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Jan 25 2011	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Jan 25 2011	Brief amicus curiae of Justice and Freedom Fund filed. (Distributed)
Jan 25 2011	Brief amici curiae of National Fraternal Order of Police, et al. filed. (Distributed)
Feb 2 2011	Record from U.S.C.A. for 3rd Circuit is electronic
Feb 17 2011	Reply of petitioners Borough of Duryea, Pennsylvania, et al. filed. (Distributed)
Feb 17 2011	Lodging request received from counsel for the respondent.
Feb 22 2011	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 22 2011	Argued. For petitioners: Daniel R. Ortiz, Charlottesville, Va., and Joseph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Eric Schnapper, Seattle, Wash.

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue.

PARTIES TO THE PROCEEDING

In addition to the party identified in the caption, petitioners also include Duryea Borough Council; Ann Dommes, Individually and in her Official Capacity as Council President; Lois Morreale, Individually and in her Official Capacity as Borough Secretary; Frank Groblewski, Individually and in his Official Capacity as Councilman; Edward Orkwis, Individually and in his Official Capacity as Councilman; Robert Webb, Individually and in his Official Capacity as Councilman; Audrey Yager, Individually and in her Official Capacity as Councilwoman; Joan Orloski, Individually and in her Official Capacity as Councilwoman; and Alfred Akulonis, Individually and in his Official Capacity as Councilman.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Third Circuit, App., *infra*, 1a-15a, is available at 2010 WL 381398. The district court's memorandum and order granting in part and denying in part petitioners' motion for summary judgment is unreported. App., *infra*, 55a-95a. The district court's memorandum and order denying petitioners' motion for a new trial and judgment as a matter of law, App., *infra*, 16a-54a, is available at 2008 WL 4132035.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2010. Petitioners timely filed a petition for rehearing and rehearing en banc, which was denied on March 4, 2010. App., *infra*, 97a-98a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and the right of the people * * * to petition the Government for a redress of grievances."

STATEMENT

This case concerns whether state and local government employees may sue their employers for retaliation under the Petition Clause of the First Amendment, U.S. Const. Amend. I, cl. 6, when they petition on matters of purely private concern. The Third Circuit has repeatedly held that they can. See, *e.g.*, App., *infra*, 8a; *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242 n. 24 (3d Cir. 2006); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 442-443 (3d Cir. 1994).

The Third Circuit's decision below conflicts with decisions of this Court, which have held that when "a public employee speaks * * * as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick* v. *Myers*, 461 U.S. 138, 147 (1982). It is also contrary to the uniform rule of other appellate courts.

The ten other federal circuits, as well as the four state supreme courts, that have addressed this question have uniformly held that claims like respondent's are not cognizable. *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1058-1059 (2d Cir. 1993); *Andrew* v. *Clark*, 561 F.3d 261, 269 (4th Cir. 2009); *Rathjen* v. *Litchfield*,

878 F.2d 836, 842 (5th Cir. 1989); *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); *Gunter* v. *Morrison*, 497 F.3d 868, 872 (8th Cir. 2007); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1221 (9th Cir. 1997); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *D'Angelo* v. *School Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007); *Pratt* v. *Ottum*, 761 A.2d 313, 321 (Me. 2000); *Harris* v. *Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000). The decision below stands contrary to the great weight of precedent and critically undermines the ability of state and local governments to manage their work forces. The Third Circuit has repeatedly refused to bring its law into accord with the uniform view of the other courts of appeals and this case represents an ideal vehicle for resolving this important and frequently recurring question.

A. Constitutional Background

The First Amendment guarantees "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. Amend. I, cl. 6. This Court has noted that this "[c]lause was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). Recognizing that "[t]hese First Amendment rights are inseparable," it has held that "there is no

sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Ibid.*

In *Connick* v. *Myers*, 461 U.S. 138 (1983), this Court held that the First Amendment's Free Speech Clause does not protect a public employee from retaliation for speech on a matter of no public concern. Resting on "the common-sense realization that government offices could not function if every employment decision became a constitutional matter," *id.* at 143, this Court held that when a public employee speaks "upon matters only of personal interest * * * a federal court [should not] review the wisdom of a personnel decision taken by [the employer] in reaction to the employee's behavior," *id.* at 147. The decision below disregards this Court's holdings in both *McDonald* and *Connick*.

In *San Filippo* v. *Bongiovanni*, the Third Circuit refused to extend the public concern requirement that this Court applied to free speech retaliation claims in *Connick* to similar petition claims. 30 F.3d at 443. Rejecting the uniform view of all circuits that had considered the issue at the time, the *San Filippo* majority distinguished petition claims from free speech claims. "When one files a 'petition,'" the majority argued, "one is not appealing over government's head to the general citizenry; when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." *Id.* at 442. To disallow a retaliation claim because it addressed purely private concerns, the majority asserted, would make "the petition

clause * * * a trap for the unwary—and a dead letter." *Ibid.*

Judge Becker dissented vigorously on this point. He would have held "that a public employee plaintiff who has 'petitioned' is in no better position than one who has merely exercised free speech." *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting). The majority's position, he believed, (1) defied "the inexorable logic of *McDonald* v. *Smith*," *ibid.*, (2) invited "wary [public employees] to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined, [and (3)] would undermine the government's special role as an employer," *ibid.*

B. District Court Proceedings

After being dismissed as the chief of police for Duryea Borough, respondent Charles J. Guarnieri filed a grievance, which ultimately led to his full reinstatement after arbitration. App., *infra*, 4a. On his first day back, the Duryea Borough Council issued eleven directives to Guarnieri, instructing him how to perform certain aspects of his job.[1] *Ibid.* He filed another grievance, which led to another

---

[1] The directives instructed him, among other things, (1) not to work more than eight hours a day or more than forty hours per week, (2) to follow Duryea's purchase order system, (3) to patrol four to five hours during every eight-hour shift, (4) to submit a weekly written report, (5) to use the police car only for official business, and (6) to keep the police department offices smoke-free. App., *infra*, 57a-59a.

arbitration, which directed the Borough to modify or withdraw some of the directives. *Ibid.* Other disputes arose, as a result of which Guarnieri filed this lawsuit, claiming that the directives and other acts constituted retaliation in violation of the Petition Clause for his having filed and won his initial grievance. App., *infra*, 5a. Later the Borough denied an overtime claim by Guarnieri on the ground that he had not explained why the overtime was necessary. *Ibid.* After an investigation, however, the Pennsylvania Department of Labor directed the Borough to pay the claim, *ibid.*, and Guarnieri amended his complaint to add the denial of overtime as a retaliatory act, *ibid.*, for his having filed his grievances and this lawsuit, Am. Compl. at 9.

Petitioners, Duryea Borough and various of its officials (collectively "Duryea"), sought summary judgment on Guarnieri's retaliation claim for filing his grievance and this lawsuit. App., *infra*, 55a-56a. Duryea argued, among other things, that Guarnieri's grievances and lawsuit did not represent protected activity because they concerned purely private matters. The district court, relying on *San Filippo*, denied Duryea summary judgment on the claim. "The filing of a formal petition," it held, "is protected without regard to whether the petition addresses a matter of public concern." App., *infra*, 79a (citing 30 F.3d 424, 442 (1995)). After trial, the jury found that issuing the directives and withholding overtime constituted retaliation and awarded Guarnieri damages. App., *infra*, 5a-6a.

Duryea then moved for judgment as a matter of law on the petition claim. It renewed its argument that only petitions addressing matters of public concern could give rise to retaliation claims. The district court, however, again relying on *San Filippo*, rejected it again: "The filing of * * * a petition is protected without regard to whether the petition addresses a matter of public concern." App., *infra*, 27a. The district court noted, however, "that the holding of *San Filippo* contravenes the law of numerous other circuit courts [and that] the Supreme Court has yet to decide the split in authority between the Third Circuit and other Courts of Appeals." *Ibid.*

C. Court of Appeals Proceedings

On appeal, the Third Circuit rejected Duryea's argument that it should adopt the uniform position of the other courts of appeals. Like the district court, it followed its holding in *San Filippo*:

> This court [has] held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of purely private concern." Defendants urge us to overrule that holding because other courts of appeals disagree, *see San Filippo* v. *Bongiovanni*, 30 F.3d at 440 n. 19 (collecting cases); *Martin* v. *City of Del City*, 179 F.3d

> 882, 889 (10th Cir. 1999), but we are bound by our prior holding.

App., *infra*, 8a (quoting *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007) (citing *San Filippo* v. *Bongiovanni*, 30 F.3d 424 (3d Cir. 1994)). The Third Circuit later denied Duryea's request for it to revisit this circuit precedent by denying its petition for rehearing and rehearing en banc. App., *infra*, 97a-98a.

REASONS FOR GRANTING THE PETITION

1. The Third Circuit's Decision Entrenches A Split Among The Circuits Over Whether The Petition Clause Protects Public Employees From Retaliation When They Petition On Matters Of Purely Private Concern

The First Amendment protects the right "to petition the Government for a redress of grievances." U.S. Const. Amend. 1, cl. 1. The courts of appeals are split, however, over whether the First Amendment protects a public employee from retaliation for petitioning the government about a matter of purely private concern. Ten courts of appeals have applied the standard that this Court developed in *Connick* v. *Myers* for free speech-based retaliation claims and have held expressly that in the retaliation context "a public employee's petition, like his speech, is constitutionally protected only when it addresses a matter of public concern." *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 448 (4th

Cir. 2004); accord *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *Grigley* v. *City of Atlanta*, 136 F.3d 752, 755-756 (11th Cir. 1998); *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 11-12 (1st Cir. 1998); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1223 (9th Cir. 1997); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Hoffmann* v. *Mayor of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 701-703 (5th Cir. 1985). All state courts of last resort that have addressed this question also agree that "in order for a public employee to have a viable § 1983 claim [under the Petition Clause], the petition must address a matter of public concern." *Pratt* v. *Ottum*, 761 A.2d 313, 320-321 (Me. 2000); accord *Harris* v. *Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000).

These courts thus adhere to this Court's holding that "First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Kirby*, 388 F.3d at 488 (citing *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985)); accord *Grigley* v. *City of Atlanta*, 136 F.3d 752, 755-756 (11th Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993). These

courts have reasoned that to recognize retaliation claims lacking any public concern under the Petition Clause, when such claims are not recognized under the Free Speech Clause, would "elevate the Petition Clause to special First Amendment status." *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988) (quoting *McDonald*, 472 U.S. at 485). As this Court has instructed, however, "[t]he Petition Clause * * * was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *Ibid.* As ten courts of appeals have recognized, "[w]ere we to adopt [the public employee's] position that the right to petition is absolute, we would be guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*." *Ibid.*; accord *Rendish*, 123 F.3d at 1222.

Fidelity to the principles explained in *McDonald* serves other important interests. Consistent with federalism principles, for example, the majority rule affords state and local governments necessary flexibility as employers rather than turning literally every minor employment decision into "a federal case." As the First and Second Circuits explained, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.*, 991 F.2d at 1058 (citing *Connick*, 461 U.S. at 147). These courts have reasoned that "government officials should enjoy wide latitude in

managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *White Plains Towing Corp.*, 991 F.2d at 1058 (citing *Connick*, 461 U.S. at 146).

Many of these courts also have recognized that a contrary rule would permit public employees to make an end run around the public concern requirement for free speech retaliation claims simply by couching their expression in the form of a petition. Interpreting the Petition Clause to protect all public employee petitions from retaliation regardless of their purely private nature "would allow the anomalous result that a private employment dispute could be 'constitutionalized merely by filing a legal action.'" *Kirby*, 388 F.3d at 448 (citing *Altman* v. *Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984)); accord *Rendish*, 123 F.3d 1216, 1221 (9th Cir. 1997). These courts understand that "special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form." *Belk*, 858 F.2d at 1262; accord *Hoffmann* v. *Mayor of Liberty*, 905 F.2d 229, 234 (8th Cir. 1990); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d. 696, 703 (5th Cir. 1985).

The Third Circuit has repeatedly rejected the approach and reasoning of the majority and flouted this Court's precedents. It has held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the

petition concerns a matter of solely private concern." App., *infra*, 8a (citing *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 435-442 (3d Cir. 1994)). The Third Circuit has justified its rule by pointing to the "distinct origin of the Petition Clause" and has criticized this Court for "ignoring the varied histories of the right to petition and the freedoms of speech, religion, and the press." *Foraker*, 501 F.3d at 236 (citing *McDonald*, 472 U.S. at 485). While acknowledging *McDonald*, the Third Circuit rejects the essential logic of that decision and instead argues that "the right to petition has a pedigree independent of—and substantially more ancient—than the freedoms of speech and press." *San Filippo*, 30 F.3d. at 443. The Third Circuit contends that providing those who petition broader protection from retaliation than those who speak "is legitimate because the Petition Clause is not merely duplicative of the Free Speech Clause." *Foraker*, 501 F.3d at 236. According to the Third Circuit, "there is an independent reason—a reason of constitutional dimension—to protect an employee lawsuit or grievance if it is of the sort that constitutes a 'petition' within the meaning of the first amendment." *San Filippo*, 30 F.3d at 441-442.

The Third Circuit maintains that these differences in origin, pedigree, and purpose "correlate[] to *** separate analysis for each clause." *Foraker*, 501 F.3d at 237. In the Third Circuit's view, "[w]hereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a

government audience." *Ibid.* Thus, "[w]hen one files a 'petition' one is not appealing over government's head to the general citizenry * * * one is addressing the government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." *Id.* at 236 (quoting *San Filippo*, 30 F.3d at 442). In this view, the "[P]etition [C]lause imposes on the [government] an *obligation* to have at least some channel open for those who seek redress for perceived grievances" and imposing a public concern requirement for retaliation in public employment cases would close those channels of communication to such an extent that it would render the Petition Clause a "dead letter." *Id.* at 247, 249 (Greenberg, J., concurring) (emphasis added).

The Third Circuit has repeatedly rejected requests to bring its view into line with the majority's. See, e.g., App., *infra*, 8a; *Foraker*, 501 F.3d at 236; *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242 n.24 (3d Cir. 2006); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 442-443 (3d Cir. 1994). By denying the petition for rehearing en banc in this case, it has confirmed that it will not revisit the issue on its own. See App., *infra*, 99a. Any review must come from this Court.

The long-standing split on this important issue warrants this Court's review. As the Third Circuit observed, this Court "has not discussed the scope of the constitutional right to petition in the context of an allegedly retaliatory discharge of a public employee." *San Filippo*, 30 F.3d at 435. It is,

moreover, a recurring question of great importance. As discussed in greater detail below, *infra*, Parts III(B) and IV, it affects the rights of a large segment of the population—all state and local employees—as well as the ability of state and local governments to manage their employees efficiently and without intrusive supervision from the federal courts.

II. The Third Circuit's Rule Violates This Court's Holding In *McDonald* v. *Smith* That The Petition Clause Protects Expression No More Than Does The Free Speech Clause

The Third Circuit's rule contravenes fundamental First Amendment principles this Court set forth in *McDonald* v. *Smith*, 472 U.S. 479 (1985). As this Court recognized there, neither the rights of petition nor speech should be given priority over the other; rather, they "are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Id.* at 485 (citing *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)).

The Court spoke unanimously on this point. As Justice Brennan elaborated in his concurring opinion, the "essential unity" of the First Amendment rights counsels against interpreting the Petition Clause as conferring an absolute privilege in a context in which the Free Speech Clause does not. *McDonald*, 472 U.S. at 489 (Brennan, J., concurring). "[T]here is no persuasive reason," he ex-

plained, "for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States." *Id.* at 490 (Brennan, J., concurring).

The Third Circuit's rule disrupts this fundamental parity. So long as a public employee formalizes in a petition a workplace complaint of no interest to the public, which he can do through the commonplace step of filing a grievance, the First Amendment protects him from retaliation. If he makes the same complaint through less formal speech, to which this Court's *Connick* standard applies, it does not.

Standing alone, *McDonald*'s logic reveals the error in the Third Circuit's approach and leaves no doubt that *Connick*'s public concern requirement must apply to petitions, as every other court of appeals addressing the issue has held. See pp. 8-9, *supra*.

III. The Third Circuit's Rule Violates The Principles Of *Connick* v. *Myers*

A. The Rationales This Court Identified In *Connick* For Protecting Public Employee Speech From Retaliation Only When It Implicates A Matter Of Public Concern Apply Equally To Petitions

Even if this Court had not held in *McDonald* that speech and petitions should be treated alike, the particular First Amendment principles that compel applying *Connick's* public concern requirement to free speech apply equally to petitions. In *Engquist* v. *Oregon Dep't of Agric.*, this Court identified two principles that underlie its public employment decisions:

> First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.

128 S. Ct. 2146, 2152 (2008). In *Engquist*, these principles required rejecting "class-of-one" equal

protection claims in public employment. *Id.* at 2148-2149. Here, they require that public employee petitions address a matter of public concern before receiving protection from retaliation.

Starting with the second principle, the public concern requirement is indispensible if the retaliation claim is actually to implicate concerns at the heart of the First Amendment. In protecting from retaliation petitions addressing matters of purely private concern, the Third Circuit has mistakenly distinguished between the purposes of the Free Speech and Petition Clauses. See, *e.g.*, *Foraker*, 501 F.3d 231, 237 (3d Cir. 2007) ("Whereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a government audience. This distinction correlates to the separate analysis for each clause."). The First Amendment Free Speech and Petition Clauses, however, share a singular purpose: to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick*, 461 U.S. at 145 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964)); see also *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'")). It follows that expression that most facilitates this aim—expression on matters of public concern—"is entitled to special protection" under the First

Amendment. *Connick*, 461 U.S. at 145. The same cannot be said of expression on purely private matters. *See Kendish*, 123 F.3d 1216, 1223 (9th Cir. 1997) ("[The Third Circuit's approach] diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation.").

This Court has long recognized that the government's special interests as employer warrant limiting protection of public employee speech to matters of public concern. In particular, this Court has held that, when a public employer has retaliated for employee speech, "[t]he problem * * * is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of *public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968) (emphasis added).

In *Connick*, this Court further held that when speech does not address a matter of public concern courts should not even engage in *Pickering* balancing. 461 U.S. at 146 ("[I]f [the employee speech in question] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [retaliation]."). This type of speech thus enjoys no First Amendment protection from retaliation. When

speech addresses purely private concerns, "government officials should enjoy wide latitude in managing their offices." *Ibid.* As *Connick* reasoned,

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id. at 151 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

The particular rationales that justified the public concern requirement in *Connick* apply equally when public employee expression takes the form of a petition. First, to the extent that a government employee's speech is disruptive, formalizing it by filing a written grievance or lawsuit—and thus engaging the government in a time-consuming formal dispute—would make it only more so. Second, speech and petitions should receive equal protection from public employer retaliation because the nature of the employer-employee relationship is the same, whatever the form of expression. Indeed, a public employer acts no less as an *employer* when it responds to expression in the form of a petition.

The same reasons *Connick* applied the public concern requirement to speech apply to petitions. When two types of expression, protected by the same constitutional amendment, give rise to similar consequences, no reason supports protecting one more than the other. Petitions should receive the same level of First Amendment protection from government employer retaliation as speech—no more, no less.

B. The Dangers Of Constitutionalizing Public Employment Law And Creating An End Run Around *Connick* Strongly Support Recognizing Only Those Retaliation Claims Involving Petitions On Matters Of Public Concern

Recognizing a cause of action for *every* public employee's claim of retaliation for filing employment grievances and making other formal employment complaints would constitutionalize many garden-variety employment disputes that rightfully belong in state court (if in any judicial forum). As this Court acknowledged in *Connick*, "it would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance." 461 U.S. at 154. "[W]hile the First Amendment invests public employees with certain rights," this Court stated in *Garcetti* v. *Ceballos*, "it does not empower them to

'constitutionalize the employee grievance.'" 547 U.S. 410, 420 (2006) (quoting *Connick*, 461 U.S. at 154); see also *Engquist*, 128 S. Ct. 2146, 2156 (2008).

There are limits to what the First Amendment protects, and a public employee's interest in preserving his personal vision of his job deservedly rests outside the scope of protection. *See Board of Regents* v. *Roth*, 408 U.S. 564, 575 n.14 (1972) ("Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest."). Just as this Court has declined to convert the Fourteenth Amendment into a "font of tort law," *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768 (2005) (citing *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981) (quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976))), the Petition Clause must likewise not become a font of public employment law. Rather, personal grievances and petitions "are best left to internal procedures established by employers and employees or * * * where such procedures are inadequate, through state court adjudication." *Altman* v. *Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984).

By confounding petitioners' actions with violation of a constitutional right, the decision below permits federal litigation on all sorts of petitions and grievances. As other courts of appeals have recognized, "permitting [retaliation claims that lack a matter of public concern] would open the federal floodgates to all manner of petty personal disputes." *Altman*, 734 F.2d at 1244. This Court has already

rejected protecting speech exercised as part of a public employee's official duties because it "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business." *Garcetti*, 547 U.S. at 423. "This displacement of managerial discretion by judicial supervision finds no support in [this Court's] precedents." *Ibid.* Simply put, a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976).

Just as with speech, special protection for petitions of purely private concern would involve federal courts in everyday office management. It would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti*, 547 U.S. at 423. As this Court explained in *Connick*, "[p]erhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable." 461 U.S. at 146-147 (citing *Board of Regents* v. *Roth*, 408 U.S. 564; *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Bishop*, 426 U.S. at 349-350). When, as here, the alleged retaliation amounts to far less than dismissal—and, indeed, involves *ongoing supervision* of an

employee—federal judicial involvement is even less warranted.

Institutional and state remedies efficiently resolve workplace disputes without requiring government employers to waste valuable time and resources defending constitutional claims in federal court. Abandoning the public concern requirement displaces these remedies and allows many ultimately fruitless claims to survive a motion to dismiss in federal court. "[G]overnments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack." *Engquist*, 128 S. Ct. at 2157. When a petition actually touches upon a matter of public concern, the federal courts' and public employers' time and attention might be warranted; when it does not, however, federal courts will waste valuable public resources, and plaintiffs will be able to assert "largely groundless claim[s] to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the *** process will reveal relevant evidence." *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)). When the party facing liability in a retaliation case is a government employer, time-consuming litigation carries great costs to the efficient operation of local government offices—to the detriment of the offices' provision of services to citizens.

Relaxing *Connick's* public concern requirement in petition cases would, moreover, undermine *Connick* itself. By favoring petitions over speech, the Third Circuit's rule creates an easy end run around *Connick*'s public concern requirement. In *Connick*, for example, this Court held that most items in a questionnaire distributed by a government employee to her colleagues did not involve any matter of public concern and were thus unprotected. 461 U.S. at 148. If petitions need not involve matters of public concern to receive protection, then *Connick* loses much of its force. Had she not been terminated immediately, the plaintiff in *Connick* could simply have filed her questionnaire in a grievance in order to have received First Amendment protection. In other words, abolishing the public concern requirement for petitions gives public employees a perverse incentive to formalize any expression of complaint in a grievance, lawsuit, or other means of petition in order to escape *Connick's* strictures.

As recognized by numerous courts that have rejected the Third Circuit's reasoning, it makes no sense "to elevate * * * an employee's complaint [on a personal matter] to the level of constitutional protection merely because she has asserted it in the form of a grievance." *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 703 (5th Cir. 1985); accord *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2004); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); see also *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting) (warning that recognition of Petition Clause claims on matters

of purely private concern would represent "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined" and also would "undermine the government's special role as an employer"). The mere form an employment complaint takes should not determine the scope of First Amendment protection.

IV. This Case Presents An Ideal Vehicle For Resolving A Recurring And Important Issue Of Constitutional Law

This Court has long recognized that government's overall effectiveness rests in large part on its ability to manage its employees efficiently. See, *e.g.*, *Ex parte Curtis*, 106 U.S. 371, 373 (1882) (noting "[t]he evident purpose of congress * * * to promote efficiency and integrity in the discharge of official duties and to maintain proper discipline in the public service[, which] is within the just scope of legislative power"); *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part) (noting "the public's interest [in] the maintenance of employee efficiency and discipline[, which] are essential if the Government is to perform its responsibilities effectively and economically."); *Connick*, 461 U.S. at 150-151. Most recently, in *Engquist*, this Court noted "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." 128 S. Ct. at 2156 (quoting *Connick*, 461 U.S. at 143).

The Third Circuit's rule, however, does exactly that. By constitutionalizing many everyday disputes between public employers and employees, it turns the First Amendment into "a font of [employment law]." *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981). The rule below allows public employees to take state and local governments to federal court over run-of-the-mill employment disputes. This is far from a theoretical concern. District courts within the Third Circuit have routinely allowed public employees to "make a federal case" out of claims of alleged retaliation arising from filings relating to garden-variety disputes, such as the filing of (1) a municipal court criminal complaint for assault growing out of a fight outside a bar, *McGovern* v. *City of Jersey City*, No. 98-5186 (JLL), 2007 WL 2893323 (D.N.J. Sept. 28, 2007); (2) a lawsuit challenging a police force suspension arising from an incident in which a policeman's ex-girlfriend wrongly accused a private security employee of having sex with her ex-boyfriend, *Morgan* v. *Covington Twp*, No. 3:07-cv-1972, 2009 WL 585480 (M.D. Pa. Mar. 6, 2009); (3) a workman's compensation claim for an injured shoulder, *Moore* v. *Darlington Twp.*, No. 08-1012, 2010 WL 597989 (W.D. Pa. Feb. 17, 2010); and (4) a tort claim notice involving alleged dress code violations, *Marrero* v. *Camden County Bd. Of Soc. Services*, 164 F. Supp. 2d 455 (D.N.J. 2001). Indeed, in the present case, the Third Circuit made a federal case out of retaliation for the filing of a grievance concerning, among other things, the Borough's right to designate a building smoke-free, set an employee's work hours, and demand that the Borough's only

full-time police officer manage traffic at the only school in town at the beginning and end of the school day. App., *infra*, 57a-59a.

The sheer number of state and local employees worsens the burden such claims impose on both public employers and federal courts. The Third Circuit alone contains an estimated 1,050,316 full-time state and local employees, who are free to bring suits alleging retaliation for the filing of an employment grievance implicating no public concern. United State Census Bureau, 2008 Annual Survey of State and Local Government Employment and Payroll, http://www.census.gov/govs/apes/ (last accessed April 29, 2010) (noting Delaware has 43,913, New Jersey 465,049, and Pennsylvania 529,454 public employees, respectively); U.S. Dep't of Labor, Bureau of Labor Statistics, Database on the Virgin Islands, http://www.bls.gov/data (noting Virgin Islands have 12,900). More broadly, the question presented affects the rights of all 14,857,827 state and local employees across the country, United States Census Bureau, 2008 Annual Survey of State and Local Government Employment and Payroll, and the efficient functioning of state and local governments everywhere.

This case, moreover, represents an ideal vehicle for resolving the circuit split. The parties fully argued the issue at every stage below and both the court of appeals and the district court expressly addressed it. See App., *infra*, 8a, 27a, 78a-79a. The issue involves a pure question of law and is squarely presented by the petition.

The Third Circuit, moreover, has shown it has no intention of resolving this split on its own. It has repeatedly acknowledged that its rule conflicts with other circuits, see, *e.g.*, *San Filippo*, 30 F.3d at 439-440; App., *infra*, 8a, and it has consistently denied requests for rehearing en banc of cases concerning this question, see *San Filippo*, 30 F.3d 424, *petition for rehearing en banc denied* Aug. 18, 1994; *Foraker*, 501 F.3d 231, *petition for rehearing en banc denied* Oct. 10, 2007; App., *infra*, 97a. Worse still, the Third Circuit's clear and deeply entrenched position discourages public employers from litigating the issue and seeking appeal. Under the Third Circuit's rule, state and local governments know retaliation claims will survive a motion to dismiss, likely require discovery, and entail possible trial. Faced with that prospect, they will not only fail to press for the rule to be reconsidered, but also will face overwhelming pressure to settle claims in order to avoid the expense and disruption of fighting them on other grounds. Because of such perverse litigation incentives, a better vehicle to resolve the split and bring Third Circuit law into conformity with *McDonald* and *Connick* is highly unlikely to come before this Court.

In light of the conflict of the decision below with *McDonald*, *Connick*, and other decisions of this Court and with the decisions of all the ten other federal courts of appeals and of the four state supreme courts that have addressed the issue, this Court should consider disposing of the case summarily. Vacating the decision below and

remanding the case to the Third Circuit for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers for retaliation under the First Amendment's Petition Clause unless the petitions involved matters of public concern would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument or, in the alternative, the petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers under the Petition Clause unless their petitions involved matters of public concern.

Respectfully submitted.

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APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3949

Charles J GUARNIERI, Jr.

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AKULONIS, Individually and in his Official Capacity as Councilman,

Appellants

No. 08-4428

Charles J. GUARNIERI, Jr.
Appellant

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AKULONIS, Individually and in his Official Capacity as Councilman.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-05-cv-01422)
District Judge: Honorable A. Richard Caputo

Argued October 27, 2009

Before: SLOVITER, FUENTES and HARDIMAN
Circuit Judges

(Filed February 4, 2010)

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OPINION

SLOVITER, *Circuit Judge*.

Appellants Duryea Borough, the Borough Secretary, and members of the Borough Council (collectively "Defendants") appeal a jury's verdict and award of punitive damages on claims that they violated the First Amendment right to petition of appellee Charles J. Guarnieri, the former Chief of Police of Duryea. Guarnieri cross-appeals the District Court's reduction of his attorney's fees.

I.

Background

In February 2003, the Duryea Borough Council dismissed Guarnieri from his position as Chief of Police. Guarnieri filed a union grievance, which led to an arbitration. After about two years, Guarnieri prevailed and was reinstated to his position as Chief.

On his first day back, in January 2005, the Council issued eleven "directives" to Guarnieri. These directives comprised a list of things that Guarnieri must do or could not do on the job. Guarnieri filed a union grievance to complain about the directives, which led to another arbitration. Ultimately, the arbitrator directed Duryea to modify or abandon some of the directives.

Other disputes, often petty, arose between

Guarnieri and Defendants.[1] As a result, Guarnieri filed this lawsuit, claiming in relevant part that the directives and other acts by Duryea constituted unconstitutional retaliation for his having filed and won his 2003 grievance.

In December 2006, Guarnieri submitted a request for approximately $338.00 in overtime. The overtime was denied by the Council on the ground that Guarnieri did not explain why the overtime was necessary. The Department of Labor investigated and "found [that withholding the] overtime . . . was a violation" of the law. App at 649. Guarnieri amended his complaint to add the overtime denial as a retaliatory act.

Three of Guarnieri's First Amendment retaliation claims reached the jury: (1) the issuance of the directives; (2) the purported delay in the issuance of health insurance benefits; and (3) the withholding of overtime. The jury found for Guarnieri on the first and third claims, and awarded him a total of $45,358.00 in compensatory damages - $5,000 against each individual defendant for damages deriving from the directives; and $350.00

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[1] For example, the Council apparently told Guarnieri not to participate in truancy and seat belt programs even though those activities were funded by a grant and cost the Borough nothing. Also, Guarnieri sought to have his health insurance cover his wife, but the Borough Secretary, Morreale, did not credit Guarnieri's assertion that he was married and demanded additional paperwork, even though Guarnieri submitted a marriage licence signed by Duryea's mayor.

for damages due by the Borough and one dollar due from each individual for withholding the overtime. The jury also awarded Guarnieri a total of $52,000 in punitive damages - $3,000 against each individual defendant for issuance of the directives, and $3,500 against each individual defendant for the overtime.

The District Court denied Defendants' motions for judgment as a matter of law and for a new trial. The Court, however, granted in part Defendants' motion to reduce the attorney's fees requested by Guarnieri. It first reduced the requested number of hours (473.8) by ninety-one because of "duplicativeness [with a similar First Amendment retaliation case against Duryea brought by a Borough employee, also represented by Guarnieri's lawyer] . . . inapplicability . . . [and] excessiveness." App. at 47-48. After making some other deductions, the Court arrived at a "total of three hundred ninety (390) hours" that it found to be reasonable for the work performed by Guarnieri's lawyer through the trial. App. at 48. The Court then added thirty-two hours for post-trial work to which Defendants did not object and made a few other adjustments to the total hours not relevant here.

After reviewing Guarnieri's counsel's experience, the Court determined that a reasonable rate was $215 an hour, rather than the requested rate of $300 an hour. The Court referenced its prior decision in *Lohman v. Borough*, No. 05-1423, 2008 WL 2951070, at *7-8 (M.D. Pa. July 30, 2008), where it had fixed Guarnieri's counsel's fee at $215 an hour. The District Court calculated that the

"lodestar" for the sum of all legal work on Guarnieri's case was $102,110.25. The Court made a further, omnibus reduction to the lodestar of over 50%; in the end it awarded only $45,000 in fees.[2]

II.

Analysis

Defendants contend they are entitled to judgment as matter of law, arguing: (1) that the evidence did not support a finding of punitive damages; (2) that the First Amendment does not protect government employees from retaliation for the filing of petitions unless they address matters of public concern; (3) that Guarnieri's petitioning activity was not protected because it was performed pursuant to his official duties; (4) that Defendants were entitled to qualified immunity because the law was not clearly established; and (5) that, for a variety of reasons, the evidence was insufficient to support liability. Defendants also argue they are due a new trial because the District Court denied their request to introduce into evidence sections of the 2005 arbitrator's report. Guarnieri cross-appeals the Court's omnibus reduction of the lodestar.

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[2] The District Court had jurisdiction under 28 U.S.C. §§ 331 and 1343. This court has jurisdiction under 28 U.S.C. § 1291.

A. The First Amendment and Qualified Immunity

This court held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern." *Foraker v. Chaffinch*, 501 F .3d 231, 236 (3d Cir. 2007) (citing *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994)). Defendants urge us to overrule that holding because other courts of appeals disagree, *see San Filippo*, 30 F.3d at 440 n. 19 (collecting cases); *Martin v. City of Del City*, 179 F.3d 882, 889 (10th Cir. 1999), but we are bound by our prior holding.

Defendants also assert that "neither the Third Circuit nor the Supreme Court has decided the question of whether or not an employee who is petitioning the government pursuant to his official duties is acting as a citizen for First Amendment purposes" Appellants' Brief at 24 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). We need not decide that issue because Defendants cite to no evidence that Guarnieri's union grievance was made pursuant to his official duties.

Our decision in *San Filippo* is clearly established, controlling law, and Defendants are not entitled to qualified immunity. *See Francisco Jose Rivero v. City and County of San Francisco*, 316 F.3d 857, 865 (9th Cir. 2002) ("The issue is not what the law was or might have been in other circuits . . . . [i]t

is, rather, what the 'controlling authority in [the defendants'] jurisdiction [was] at the time of the incident ' " (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

B. Sufficiency of the evidence[3]

Defendants' argument that Borough Secretary Morreale is not liable because she was merely performing clerical duties belies the evidence. Among other things, the Council acted through Morreale, Duryea's personnel manager, who was responsible for paying Guarnieri, and the directive stating that Guarnieri had to obey orders was given by the Council through Morreale. "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

Defendants also argue that there was no evidence that Dommes, Groblewski, Orkwis, Webb, Yager, and Orloski were involved in the withholding of overtime. However, they all had been Council members at some time and did not argue to the jury that they were no longer Council members when the decision denying Guarnieri's overtime pay was

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[3] "We review a denial of judgment as a matter of law *de novo*, viewing the evidence in the light most favorable to the prevailing party." *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006) (citing *Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005)).

made.[4] The District Court referenced ample witness testimony from which a juror could reasonably infer it was the Council that withheld the overtime.

Defendants' arguments that the only evidence of retaliation was temporal proximity, and that the temporal proximity evidence was insufficient are unpersuasive. The directives were issued the day that Guarnieri returned to work; there was evidence of continued acrimony between Guarnieri and Defendants; and this action was ongoing when the overtime was withheld.

Defendants argue that the issuance of the directives and the failure to pay Guarnieri for overtime would not have deterred "a person of ordinary firmness from exercising his constitutional rights." Appellants' Brief at 35. First Amendment retaliation claims are indeed cognizable only when the retaliatory act would " 'deter a person of ordinary firmness' from exercising his First Amendment rights," *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000), but the " 'deterrence threshold,' . . . is very low . . . . [as] a cause of action is supplied by all but truly de minimis violations," *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006) (citing *Suppan*, 203 F.3d at 234-35). "Even 'an act of retaliation as trivial as failing to hold a birthday party for a public employee,' if 'intended to punish her for exercising her free speech rights,' may be actionable . . . ." *O'Connor*, 440 F.3d at 128 (quoting

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[4] Dommes and Webb testified but apparently never denied that they or others participated on the Council at the relevant times.

Suppan, 203 F.3d at 234) (internal quotations omitted)). The jury was instructed to determine whether the retaliation in this case would have deterred a person of ordinary firmness, and we will not second-guess its verdict.

The argument of Duryea Borough that it had no policy or custom concerning any of the actions of which Guarnieri complains and therefore has no liability is unavailing because a "single decision by a final policy-maker . . . may constitute official policy," *San Filippo*, 30 F.3d at 445 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986)). There was ample evidence that the Council both made Borough policy and was responsible for the retaliatory acts.

C. New trial

Defendants challenge the District Court's exclusion of the 2005 arbitrator's report. Defendants do not specify any error in the District Court's reasoning that the report was hearsay. Their citations and arguments concerning prejudice, however, are unconvincing; indeed, during the trial the Court upheld many of their objections to Guarnieri's use of the report. Defendants had ample opportunity, which they used, to tell their position.

D. Punitive damages

Defendants argue that there was insufficient evidence to support the jury's award of punitive damages. *See Springer v. Henry*, 435 F.3d 268, 281

(3d Cir. 2006) (holding that a "jury may award punitive damages when it finds reckless, callous, intentional, or malicious conduct."). We agree with them on this point. Although the record supports the jury's finding that issuance of the directives and the withholding of overtime pay were retaliatory acts, and that those acts were petty and careless, neither those acts, nor any of the other petty and careless acts committed by Defendants, show "reckless or callous indifference to the federally protected rights of others." *Brennan v. Norton*, 350 F.3d 399, 428 (3d Cir. 2003) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). Overall, these acts support little "more than the retaliatory motive itself." *Brennan*, 350 F.3d at 429-30.

E. Attorney's fees

Finally, in his cross-appeal Guarnieri challenges the District Court's reduction of the lodestar. The District Court gave the following reasons: (1) the "overlapping labor" with the *Lohman* case; (2) its belief that Guarnieri's case was not novel or difficult because the issues were similar to those in *Lohman*, and because counsel had brought § 1983 claims in the past; (3) the case was taken on a contingency basis, which, at an assumed 33% fee rate (no rate was provided to the Court) would have resulted in an attorney's award of about $40,000; and, (4) the attorney's fee award in *Lohman* was only $30,000.[5] Reliance on these reasons was legal

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[5] Notably, the District Court did not apportion based on the number of successful claims. Nor did the

error.[6]

"We review a district court's award of fees for abuse of discretion[,] . . . review a district court's factual determinations, including . . . the number of hours [an attorney] reasonably worked on the case, for clear error[,] . . . [and][w]e exercise plenary review over the legal standard that the district court used in calculating the award." *United Auto. Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr.*, 501 F.3d 283, 290 (3d Cir. 2007) (citations and quotations omitted); *Student Pub. Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs.*, 842 F.2d 1436, 1442 n. 3 (3d Cir. 1988).

In *City of Burlington v. Dague*, the Supreme Court stated that "the difficulty of establishing [the] merits" of a claim is "ordinarily reflected in the lodestar . . . [and thus] [t]aking account of it again through lodestar enhancement amounts to double counting." 505 US. 557, 562-63 (1992) (internal citations omitted). The Supreme Court has also "specifically held . . . that the 'novelty [and] complexity of the issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount.

District Court characterize the work by Guarneri's attorney as inferior.

[6] Guarnier. also argues the District Court erred in setting counsel's hourly rate at $215. That rate is not clear error. *See United Auto. Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr.*, 501 F.3d 283, 290 (3d Cir. 2007); *see also Lohman* 574 F.3d at 164 n. 1.

and thus cannot serve as independent bases for increasing the basic fee award." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (quoting *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984)); *United Auto. Workers*, 501 F.3d at 292.

The factors on which the District Court relied in reducing this "lodestar," i.e., the difficulty of the case, overlapping hours, and counsel's experience, were the same as the factors it considered in establishing the lodestar.[7]

The District Court also erred by using the contingency nature of a case to reduce fees, a practice specifically prohibited by *Dague*. *See* 505 U.S. at 561-62.[8] In addition, the District Court's use

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[7] The District Court further erred because it gave Defendants relief they never asked for. Defendants only requested reductions for specifically identified hours as overlapping with *Lohman*, and stated that "[i]f time was marked as specifically for work done on the Guarnieri matter, Defendants do not seek to reduce that time." Dist. Ct. Dkt. 133 pg. # 14. Ordinarily, Courts should not *sua sponte* apply negative multipliers. *See Rode*, 892 F.2d at 1192.

[8] We recognize that the referenced Supreme Court cases prohibited double counting in connection to the increase of fees awards, and that here the District Court decreased the fees. However, Defendants make no argument, and we can think of none, why these holdings would not apply equally to prohibit a district court from double counting to reduce fees. *See, e.g., Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir. 2000) ("A district court may not rely on a contingency

of the fee award in *Lohman* (where the lodestar was significantly lower) as support for the downward multiplier was error. The award in that case was reduced significantly because the plaintiff had rejected a settlement offer that was much higher than the ultimate jury award. *Lohman*, 574 F.3d 163. There is no evidence of such an offer here. Further, the jury in *Lohman* awarded the plaintiff only $12,000. Other than overlapping work and counsel's familiarity with the legal issues, both of which were subsumed into the lodestar, there is little reason why the fee award in *Lohman* is relevant.

III.

Conclusion

The jury's verdict on the merits will be upheld except for the punitive damages award, which will be vacated. This case will be remanded to the District Court for a recalculation of attorney's fees consistent with the standards articulated in this opinion.

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agreement to increase or decrease what it determines to be a reasonable attorney's fee.")

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES GUARNIERI,	No. 3:05-CV-01422
Plaintiff,	(JUDGE CAPUTO)
v.	
DURYEA BOROUGH, et al.,	
Defendants.	

MEMORANDUM

Presently before the Court are Defendants Duryea Borough, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkis, Robert Webb, Audrey Yager, Joan Orloski, and Alfred Akulonis' post-trial motions. These motions include a renewed Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50, a Motion for a New Trial pursuant to Federal Rule of Civil Procedure Rule 59, and a Motion to Stay Proceedings

to Enforce Judgment. (Docs.121, 127.) Because sufficient evidence exists such that a reasonable juror could find for the Plaintiff, and because there is no significant error of law on which to grant a new trial, the Rule 50 and 59 motions will be denied. As the Court will dispose of the Rule 50 and 59 motions in this Memorandum and Order, Defendants' motion to stay will be denied as moot.

BACKGROUND

On July 18, 2005, Plaintiff Charles Guarnieri, Jr. filed a civil action against Duryea Borough, Ann Dommes, Lois Morreale, Frank Groblewski, Edward Orkis, Robert Webb, Audrey Yager, Joan Orloski, and Alfred Akulonis. (Doc. 1.) Plaintiff filed his Amended Complaint against these Defendants on December 21, 2006. (Doc. 38.) The Amended Complaint alleged various claims including violations of his Fourteenth Amendment pre- and post-deprivation due process rights, and several claims of First Amendment retaliation. (Doc. 38.) Defendants filed an Answer to the Amended Complaint on December 29, 2006. (Doc. 43.) On December 22, 2006, the Defendants moved for summary judgment. (Doc. 39.) On November 15, 2007, the motion for summary judgment was granted in part and denied in part. (Doc. 51.) The remaining claims involved allegations of violations of Plaintiff Guarnieri's First Amendment rights. (Doc. 51.)

The remaining counts went to trial on April 14, 2008. The jury returned a verdict on April 17,

2008 in favor of the Plaintiff with respect to retaliation for the issuance of the directives and the withholding of overtime compensation, and awarded forty-five thousand, three-hundred and fifty-eight dollars ($45,358.00) in compensatory damages and fifty-two thousand dollars ($52,000.00) in punitive damages. (Doc. 101.)

Following trial, Defendants filed various post-trial motions, including a renewed Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50, a Motion for a New Trial pursuant to Federal Rule of Civil Procedure Rule 59, and a Motion to Stay Proceedings to Enforce Judgment. (Docs.121, 127.)

These motions are fully briefed and ripe for disposition.

LEGAL STANDARDS

I. Rule 50(b)

Under Rule 50(b), a party may renew its request for a motion for judgment as a matter of law by filing a motion no more than ten (10) days after judgment is entered. *See* FED. R. CIV. P. 50(b). In the present case, Defendants' Rule 50(b) motion was timely filed. (Doc. 218.) Judgment notwithstanding the verdict should be granted sparingly. *See Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993). In deciding whether to grant a Rule 50(b) motion:

> the trial court must view the evidence in the light most favorable to the non-moving party, and determine whether the record contains "the minimum quantum of evidence from which a jury might reasonably afford relief." The court may not weigh evidence, determine the credibility of witnesses or substitute its version of the facts for that of the jury. The court may, however, enter judgment notwithstanding the verdict if upon review of the record, it can be said as a matter of law that the verdict is not supported by legally sufficient evidence.

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691-92 (3d Cir. 1993), *abrogation on other grounds recognized by United Artists Theatre Circuit, Inc. v. Twp. of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003) (citations omitted). A Rule 50 motion will be granted "only if, viewing the evidence in the light most favorable to the nonmovant and giving [the nonmovant] the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). The question is not whether there is literally no evidence supporting the non-moving party, but whether there is evidence upon which the jury could properly find for the non-moving party. *See Walter*, 985 F.2d at 1238 (citing *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978)).

II. RULE 59(a)

Under Rule 59(a), motions for a new trial must be filed within ten (10) days of the date the judgment was entered. *See* FED. R. CIV. P. 59. Defendants' motion for a new trial was timely filed. (Doc. 209.) The decision to grant a new trial is left to the sound discretion of the trial judge. *See Blackiston v. Johnson*, No. 91-5111, 1995 WL 563834, at *1 (E.D.Pa.1995), *aff'd* 91 F.3d 122 (3d Cir. 1996), *cert. denied* 519 U.S. 953 (1996). Courts have granted motions for a new trial where: (1) there is a significant error of law, to the prejudice of the moving party; (2) the verdict is against the weight of the evidence; (3) the size of the verdict is against the weight of the evidence; or (4) counsel engaged in improper conduct that had a prejudicial effect on the jury. *See Maylie v. Nat'l R.R. Passenger Corp.*, 791 F.Supp. 477, 480 (E.D.Pa.), *aff'd* 983 F.2d 1051 (3d Cir. 1992). Where the evidence is in conflict, and subject to two (2) or more interpretations, the trial judge should be reluctant to grant a new trial. *See Klein v. Hollings*, 992 F.2d 1285, 1295 (3d Cir. 1993).

DISCUSSION

I. Renewed Motion for Judgment as a Matter of Law

Defendants first move for judgment as a matter of law after trial pursuant to Rule 50 of the Federal Rules of Civil Procedure. Rule 50(b)

provides, in relevant part:

> [i]f the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment - or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged - the movant may file a renewed motion for judgment as a matter of law . . . .

FED. R. CIV. P. 50(b). Plaintiff argues that Defendants waived their right to a renewed motion for judgment as a matter of law when they failed to make a motion at the close of all evidence. *See Kruczek v. Borough of Lansford*, Civ. A. No. 3:04-CV-1179, 2006 WL 1410620, at *1 (M.D. Pa. May 21, 2006) (Caputo, J.) (citing *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 364 (3d Cir. 1999)) (finding Defendants waived their right to a renewed motion for judgment as a matter of law when they failed to raise the motion at the close of evidence). Defendants, however, did renew their Rule 50 motions at the close of evidence. (Trial Tr. vol. 3, 202-03, Apr. 16, 2008.)

Furthermore, *Kruczek* was decided prior to the 2006 Amendments to the Rule 50. The Advisory Committee Notes on the 2006 Amendment to Rule 50 state that "Rule 50(b) is amended to permit

renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion."

Defendants did properly renew their Rule 50 motion. Even if they had not, Defendants need not raise a Rule 50 motion at the close of the evidence as per the 2006 Amendment to Rule 50(b). Therefore, Defendants may renew their motion for judgment as a matter of law.

II. Punitive Damages

Defendants first argue that they are entitled to judgment as a matter of law as to the punitive damages award. The jury awarded fifty-two thousand dollars ($52,000.00) in punitive damages to Plaintiff Guarnieri. (Doc. 100.) Defendants argue that the evidence at trial was insufficient to support this award.

"The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior." *Memphis Cmty. Sc. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). "A jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

The United States Constitution prevents "grossly excessive" punitive damage awards because such awards "further[] no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). In determining if a punitive damages award is reasonable, the court must consider: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)).

"[T]he must [sic] important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 419 (quoting *Gore*, 517 U.S. at 575). In evaluating reprehensible conduct, a court should look to whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.*

Defendants' argument focuses on this first prong of the three-pronged inquiry. Specifically,

Defendants assert that none of the above stated factors were present in this case, and therefore an award of punitive damages is not warranted. First, Defendants note that the harm suffered by Plaintiff Guarnieri was economic, rather than physical. Second, Defendants note that the First Amendment retaliation claims did not effect the health or safety of others. Third, Defendants argue that Plaintiff Guarnieri was not financially vulnerable. Fourth, Defendants argue that the conduct was not repeated. Finally, Defendants assert that it was not the result of intentional malice, trickery, or deceit.

Although the facts do not support the first three (3) factors, the fourth and fifth factors are supported by the facts. There is evidence in the record that actions against Plaintiff Guarnieri were repeated. Such evidence included the fact that Plaintiff received the directives and was denied overtime pay, as found by the jury. Furthermore, a reasonable juror could find that Defendants acted with malice in both issuing the directives and withholding the overtime pay. In this case, a reasonable juror could find that the conduct on part of the Defendants was malicious or wanton, and that such conduct was reprehensible. A reasonable juror could find that the directives were issued based upon wanton or malicious conduct based upon the fact that Plaintiff Guarnieri received the directives on January 21, 2005, upon his return to work after the conclusion of his grievance procedure. A jury could also find the conduct of Defendants to be wanton or malicious with respect to the denial of overtime pay. A jury could find that a fiscal retaliatory action of

denying overtime pay to a person who files a grievance to be wanton or malicious. Although all of the factors are not supported by the facts, the fourth and fifth factor weigh in favor of the reasonableness of the jury's award.

The second prong of the punitive damages test considers the difference between the punitive damages and the actual or potential harm suffered by the plaintiff. Here, the compensatory damages awarded by the jury totaled forty-five thousand, three-hundred and fifty-eight dollars ($45,358.00), compared to fifty two thousand dollars ($52,000.00) in punitive damages. (Doc. 101.) The Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. However, the *State Farm* Court stated that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to significant degree, will satisfy due process." *Id.* at 425. Citing *Gore*, the Court noted that a four-to-one (4-to-1) ratio may be close to the constitutional limits. *Id.* In this case, the ratio of punitive to compensatory damages is slightly greater than a one-to-one (1-to-1) ratio. The punitive damages in this case are not so great as to be constitutional [sic] excessive.

Finally, the Court is to consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. In this respect, Plaintiff cites to

the case of *DeLuzio v. Monroe County*, No. 3:CV-00-1220, 2006 WL 3098033 (M.D. Pa. Oct. 30, 2006) (Vanaskie, J.), *aff'd* 271 Fed App'x 193 (3d Cir. 2008). In *DeLuzio*, Judge Vanaskie denied the defendant's motion for judgment as a matter of law on a punitive damages award of twenty-five thousand dollars ($25,000.00) for a First Amendment claim. *Id.* at *14-15. The Third Circuit Court of Appeals affirmed the district court, noting that a jury could infer evil intent on part of the defendant, including from testimony about the defendant's hostility towards the plaintiff. 271 Fed. App'x at 198.

The jury in this case awarded fifty-two thousand dollars ($52,000.00) on two (2) claims of First Amendment retaliation. The *DeLuzio* jury awarded twenty-five thousand dollars ($25,000.00) for one (1) claim of First Amendment retaliation. In comparison to *DeLuzio*, the punitive damages award granted by the jury on the First Amendment claims is not unreasonable.

The evidence supports the jury's award of punitive damages. The award is reasonable based upon the ratio of the compensatory to punitive damages, the punitive damages award in similar cases, and the degree of reprehensibility of the Defendants' conduct. For these reasons, the Court will deny the Defendants' motion for judgment as a matter of law on the punitive damages claim.

III. Matter of Public Concern

Defendants argue that the Court should award the Defendants judgment as a matter of law because Plaintiff's petition did not address a matter of public concern. The Third Circuit Court of Appeals has previously held that the First Amendment's Petition Clause protects a public employee from retaliation for filing non-sham lawsuits, grievances, and other petitions directed at the government or its officials. *See San Filippo v. Bongiovanni*, 30 F.3d 424, 439 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). The filing of such a petition is protected without regard to whether the petition addresses a matter of public concern. *Id.* at 442. A petition is protected as long as it is filed in good faith, and the petition is not a sham. *Id. San Filippo* noted that formal mechanisms of filing a grievance include grievance procedures pursuant to a collective bargain agreement. *Id.* at 442. Defendants note that the holding of *San Filippo* contravenes the law of numerous other circuit courts, and therefore this Court should grant judgment as a matter of law for the Defendants. At this time, the Supreme Court has yet to decide the split in authority between the Third Circuit and other Courts of Appeals. Therefore, the law of *San Filippo* remains good law in this circuit. As a good faith grievance pursuant to a collective bargaining agreement has specifically been protected within the meaning of the Petition Clause by the Third Circuit Court of Appeals in *San Filippo*, Defendants' motion for judgment as a matter of law will be denied on these grounds.

IV. Government Employee Filing a Petition

Defendants next argue that they should be granted judgment as a matter of law because Plaintiff Guarnieri was a public employee petitioning his government employer. Defendants cite *Foraker v. Chaffinch*, 501 F.3d 231, 248-49 (3d Cir. 2007) to support the argument that Plaintiff Guarnieri's public employee relationship with Duryea Borough created a lack of protected conduct within the meaning of the First Amendment. Quoting the Supreme Court case of *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006), the *Foraker* court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 239. Based upon this rationale, the Third Circuit Court of Appeals held that when police officers complained to a state auditor about hazardous conditions at a firing range, they spoke pursuant to their duty as government employees. *Id.* at 240.

Defendants cite the following language of the *Foraker* opinion in support of the proposition that a government employee's petition to his government employer is not protected: "[w]hile the Supreme Court did not address the question of whether the rule it announced in *Garcetti* applies to First Amendment retaliation claims based on a public employee's petitioning activities, as distinguished from his speech, there is good reason to believe that

it does." *Id.* at 248-49 (Greenberg, J., concurring). This language appears in Judge Greenberg's concurring opinion, and is dicta regarding a public employee's petition rights. Therefore, it is not binding law on this court.

Furthermore, the grievance filed by Plaintiff Guarnieri was not made pursuant to his "official duties." Rather, he filed his grievance as a private citizen. Plaintiff's filing of the grievance regarding the termination of his employment and the filing of this lawsuit were not actions taken pursuant to his "official duties" as chief of police. Therefore, the *Garcetti* exception to First Amendment protection does not apply. Defendants' argument for judgment on a matter of law will therefore be denied on these grounds.

V. Qualified Immunity

Defendants next contend that they were entitled to qualified immunity on Plaintiff Guarnieri's First Amendment retaliation claims. The Third Circuit Court of Appeals in *Rouse v. Plantier* discussed the defense of qualified immunity:

> Under this doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." "The contours of the right must be sufficiently clear that a reasonable

> official would understand that what he is doing violates that right."

182 F.3d 192, 196 (3d Cir. 1999) (citations omitted).

In determining the applicability of qualified immunity, the Court must first consider "whether, '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [government official's] conduct violated a constitutional right?' " *Cipriani v. Lycoming County Hous. Auth.*, 177 F.Supp.2d 303, 326 (M.D. Pa. 2001) (McClure, J.) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). In this case, the jury concluded that the government officials of Duryea did violate Plaintiff's constitutional rights - specifically, Plaintiff's First Amendment rights. The record reflects the jury's finding that Plaintiff received the directives and was denied overtime payment because he filed a grievance and a lawsuit. The jury's verdict determined that this was the reason for the actions of the government officials. *Id.* (noting that the jury's verdict reflected the violation of the plaintiff's First Amendment rights).

The second step of the inquiry requires the Court to consider " 'whether the right was clearly established.' " *Id.* (quoting *Saucier*, 533 U.S. at 201.) The inquiry regarding clearly established rights must be considered "in light of the specific context of the case." *Id.* (quoting *Saucier*, 533 U.S. at 201.) A claim for qualified immunity is denied when the law is clearly established because " 'a reasonably competent public official should know the

law governing his conduct' unless [he] can either demonstrate extraordinary circumstances or that [he] 'neither knew nor should have known' about the legal right in question." *Id.* (quoting *Gruenke v. Seip*, 225 F.3d 290, 299 (3d Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

Defendants argue that there are two (2) areas of the law which are not clearly established. First, Defendants argue that it is not clearly established that a government employee may petition his government employer. Second, Defendants argue that it is not clearly established that the public employee's rights are protected when the matter is one of private concern.

As stated in *Cipriani*, "the law was clearly established that a public employee, such as plaintiff, could not be retaliated against for exercising his rights under the First Amendment." *Id.* (citing *Baldassare v. New Jersey*, 250 F.3d 188, 201 (3d Cir. 2001) (citing *Zamboni v. Stamler*, 847 F.2d 73, 80 n.7 (3d Cir. 1988)). At the time of Defendants' conduct, the law was clearly established that Defendants could not retaliate against the filing of a grievance or the filing of a lawsuit. *Id.* at 327-28. No reasonable government official in Defendants' position could believe that retaliating against Plaintiff by issuing directives and denying overtime was appropriate conduct. *Id.* at 328.

Furthermore, the law regarding petitions by a government employee was clearly established. The Supreme Court in *Garcetti v. Ceballos* only

considered speech made by government employees in the course of their "official duties." 547 U.S. 410 (2006). It is clear that a grievance regarding employment, and a lawsuit based upon the First Amendment were not made pursuant to official duties. As for *Foraker*, the language that a government employee may not be able to file a petition against a government employer is part of

Judge Greenberg's concurrence, and is dicta. Such language does not overcome the clearly established right of a person to file a petition.

Defendants further argue that the law is not clearly established that a matter of private concern is protected under the Petition Clause of the First Amendment. Although a number of other circuits have held otherwise, the law in the Third Circuit is clearly established. Specifically, in *San Filippo v. Bongiovanni*, 30 F.3d 424, 440 (3d Cir. 1994), the Third Circuit Court of Appeals held that a petition is protected regardless of whether the petition is a matter of public concern. Therefore, there is a clearly established right to petition for a matter of private concern in this circuit.

As the First Amendment law is clearly established, Defendants are not entitled to qualified immunity, and not entitled to judgment as a matter of law on these grounds.

VI. Personal Involvement in Overtime

Defendants request that judgment as a matter of law be entered in favor or Defendants Dommes, Morreale, Groblewski, Orkwis, Webb, Yager, and Orloski because the record does not contain evidence of personal involvement or action with respect to the withholding of Plaintiff Guarnieri's overtime pay.

"It is, of course, well established that a defendant in a civil rights case cannot be held responsible for a constitutional violation which he or she neither participated in nor approved." *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 201-02 (3d Cir. 2000) (citing *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997); *Baker v. Monroe Township*, 50 F.3d 1186, 1190 (3d Cir. 1995). Liability cannot be based solely on *respondeat superior*. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Id.*

Specifically, Defendants argue that the only Defendants named in relation to the withholding of the overtime pay were Lois Morreale and Alfred Akulonis. They assert that the record reflects that the decision to withhold the pay was made by Defendant Akulonis, and was dictated to the Borough Secretary, Lois Morreale. Defendants first argue that Lois Morreale was the Borough Secretary, and only performing her clerical duties in informing Plaintiff Guarnieri of his denial of overtime.

The evidence in the record suggests that Lois Morreale was personally involved in the withholding of Plaintiff Guarnieri's overtime pay. Lois Morreale testified as to her role in Plaintiff Guarnieri's overtime. After the United States Department of Labor audited Duryea Borough for violations, Ms. Morreale noted that the Department of Labor "gave me until March 26th to have proof that I paid the overtime. Oh, when he was leaving, I agreed to pay the overtime." (Trial Tr. vol. 3, 141:11-17;21-23, Apr. 16, 2008.) A reasonable juror could find that Ms. Morreale's "agreement" to issue the overtime check to Plaintiff Guarnieri established personal involvement by Ms. Morreale.

Next, Defendants argue that there is no evidence of a Council vote regarding the withholding of Plaintiff Guarnieri's overtime. Furthermore, Defendants assert that there were no facts showing a discussion among the council members discussing the withholding of the overtime pay. For these reasons, Defendants argue that Defendants Dommes, Groblewski, Orkwis, Webb, Yager, and Orloski should be granted judgment as a matter of law on the claim for overtime based upon a lack of personal involvement.

However, there is testimony from which a reasonable juror could find personal involvement on the part of the individuals. Alfred Akulonis was asked "were you the person who *initially* refused to pay the $330 in overtime to Chief Guarnieri?" (Trial Tr. vol. 1, 99:7-8, Apr. 14, 2008) (emphasis added).

Mr. Akulonis responded yes, and explained that he made that decision "because I didn't have - - I didn't have the facts." (Trial Tr. vol. 1, 99:9-12, Apr. 14, 2008.) Later in his testimony, Mr. Akulonis stated that the reason Plaintiff Guarnieri was denied overtime was that "[w]e did it because - - I mean, we didn't know if he worked or not . . . . We didn't approve it. In the directives it says that it has to be approved. So we didn't approve it." (Trial Tr. vol. 1, 100:17-22, Apr. 14, 2008.) From this testimony, the "we" can be inferred to be that Council did not approve the overtime, which is why he was not paid overtime.

The testimony of Lois Morreale at trial is consistent with the notion that council was involved with the denial of overtime. Ms. Morreale testified that

> Chief Guarnieri had been putting overtime-well, since the directives were in place, I believe the first directive said that overtime was only allowed if it was in extraordinary or emergency situations . . . . When I got the time sheet in December, I wrote a letter to Mayor Moss, and I wrote a letter to Chief Guarnieri asking them to explain the reasons for the overtime, and I didn't get any response.
>
> And so *council* decided not to issue the check for the overtime because they had told him and told him and nothing was ever done. So they thought about withholding his time maybe we'd get an explanation and they

> would pay him, but the explanation never came. So this-they withheld his pay.

(Trial Tr. vol. 3, 140:16-141:9, Apr. 16, 2008) (emphasis added). From the testimony of Lois Morreale, it also appears that the members of Duryea Council were involved in the withholding of Plaintiff Guarnieri's overtime pay. Based upon the testimony at trial, there is sufficient evidence of personal involvement of the members of Council in the denial of Plaintiff Guarnieri's overtime pay. Therefore, the Court will deny Defendants' motion for judgment as a matter of law on these grounds.

VII. Municipal Liability of Duryea Borough

Defendants move for judgment as a matter of law on the grounds that the evidence was insufficient to support a jury verdict against Duryea Borough. Pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. For a municipality or other government entity to be liable under § 1983, Plaintiff must establish: (1) a deprivation of a constitutionally protected right; (2) resulting from a policy, practice, or custom. *Id.* at 691-94.

"Policy is made by an official statement of a 'decisionmaker possessing final authority to establish municipal policy,' and custom can be shown by the presence of a course of conduct that 'is so well-settled and permanent as virtually to constitute law.'" *Chernavsky v. Twp. of Holmdel Police Dep't*, 136 Fed. App'x 507, 509 (3d Cir. 2005) (non-precedential) (quoting *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990)) (internal quotations omitted). Additionally, a plaintiff must show "a direct causal link between a municipal policy or custom and the alleged constitutional violation." *Id.* (citing *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 214 (3d Cir. 2001)).

Defendants argue that Plaintiff failed to prove any policy or custom executed by Duryea Borough with respect to Plaintiff Guarnieri's First Amendment retaliation claim with respect to the issuance of the directives or the denial of overtime.

The Third Circuit Court of Appeals in *San Filippo v. Bongiovanni*, 30 F.3d 424, 445 (3d Cir. 1994) noted that "[a] single decision by a final policy-maker, as defined by state law, may constitute official policy." *Id.* (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986)). In this case, there is no question that Duryea Borough Council was an official policy-making authority for Duryea Borough. Defendant Ann Dommes testified that

> We all sat down on these directives. Once the Philadelphia lawyers told us that we can put things in writing, we had a personnel meeting and the whole council came up with different ideas. Everybody threw something in, what they felt they needed for the chief to do. So we sat down.
>
> We-Lois wrote everything down as we came up with them. She sent them down to the Philadelphia lawyers, and they looked everything over and fine tuned them into this.

(Trial Tr. vol. 1, 143:9-16, Apr. 14, 2008.) When asked who sat down to make the decisions, Ms. Dommes replied "All of council at that time." (Trial Tr. vol. 1, 143:20, Apr. 14, 2008.) She further testified that Borough Council was elected by the people of Duryea. (Trial Tr. vol. 1, 143:21-24, Apr. 14, 2008.) This testimony demonstrates that the policy in this case was enacted when Duryea Borough Council discussed and passed the eleven (11) directives. Therefore, on the issue of the directives, there is sufficient evidence of policy-making by Duryea Borough for a reasonable juror to find *Monell* liability.

The denial of Plaintiff Guarnieri's overtime pay is similarly supported by evidence describing the actions of Duryea Borough Council. As stated above, the testimony of Lois Morreale evidences action on the part of Duryea Borough Council in denying Plaintiff Guarnieri of his overtime pay. Ms. Morreale testified that "council decided not to issue

the check for the overtime because they had told him and told him and nothing was ever done. So they thought about withholding his time maybe we'd get an explanation and they would pay him, but the explanation never came. So this-they withheld his pay." (Trial Tr. vol. 3, 141:3-9, Apr. 16, 2008.) Although the record does not contain evidence of an official vote to withhold Plaintiff Guarnieri's pay, the decision to "not issue the check" constitutes a "single decision by a final policy-maker" for purposes of *Monell* liability. Therefore, there is sufficient evidence for a reasonable juror to find *Monell* liability on the issue of Plaintiff Guarnieri's overtime pay. Therefore, the Court will deny Defendants' motion for a judgment as a matter of law on the grounds of *Monell* liability.

VIII. Evidence on Causation

The First Amendment retaliation inquiry requires the Plaintiff to demonstrate that the 2003 grievance was a substantial factor in the issuance of the January 21, 2005 directives.

The substantial factor test does not require Plaintiff to prove"but-for" [sic] causation. *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000). " '[S]ubstantial factor' does not mean 'dominant' or 'primary' factor . . . . Thus, even if a plaintiff shows that activity protected by the First Amendment was a 'substantial factor' in her [adverse action], the defendant may show that some other factor unrelated to the protected activity was the but-for cause of the [adverse action]." *Hill v. City of*

Scranton, 411 F.3d 118 (3d Cir. 2005) (citations omitted).

In demonstrating substantial factor causation, the Third Circuit Court of Appeals has noted that "a suggestive temporal proximity between the protected activity and the alleged retaliatory action can be probative of causation." *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003). In *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997), the Third Circuit Court of Appeals did not resolve whether the timing of an alleged retaliatory action can by itself, support a finding of causation. *Id.* The court noted that "[e]ven if timing alone could ever be sufficient to establish a causal link, . . . the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred." *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir. 2003) (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)). Temporal proximity is a fact-based analysis, which depends on "how proximate the events actually were, and the context [of the issue]." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000). For example, there is a difference between a temporal relationship of two (2) days and nineteen (19) months. *Id.* at 280.

A plaintiff may also prove evidence of causation besides temporal proximity. *Farrell*, 206 F.3d at 281. For example, a court may consider actual antagonistic conduct or animus. *Id.* The record may also be viewed as a whole. *Id.* ("[I]t can be other evidence gleaned from the record as a whole

from which causation an be inferred."). In demonstrating causation, a plaintiff may put forth evidence of "any antagonism toward the [plaintiff] or any change in demeanor toward [plaintiff]." THIRD CIRCUIT MODEL JURY INSTRUCTIONS, SECTION 1983-EMPLOYMENT DISCRIMINATION-RETALIATION-FIRST AMENDMENT, § 7.4 (2007).

Defendants argue that there is no "temporal proximity" that may be construed as retaliation. First, Defendants argue that the directives were issued two years after the filing of Plaintiff Guarnieri's termination grievance. (Pl.'s Ex. 12.) Second, Defendants argue that the denial of the overtime pay occurred in December 2006, nearly one-and-a-half years after the filing of this July 18, 2005 lawsuit. (Compl., Doc. 1.) (Trial Tr. vol. 1, 82:1-4, Apr. 14, 2008.) Furthermore, Defendants argue that the only evidence of causation is the alleged temporal proximity.

With respect to Plaintiff Guarnieri's 2003 grievance and the issuance of the 2005 directives, there is sufficient evidence for a reasonable jury to find temporal proximity as a means of "substantial factor" causation. Although the filing of the 2003 grievance by Plaintiff Guarnieri occurred approximately two (2) years prior to the alleged retaliatory action, a reasonable jury could still find temporal proximity. Plaintiff Guarnieri's 2003 grievance, the protected activity, resulted in his return to work for Duryea Borough. The issuance of the directives occurred on January 21, 2005, the same date as

Plaintiff's return to work, which was the fruition of his grievance. Therefore, a reasonable jury could find temporal proximity based upon the fruition of Plaintiff's grievance and the issuance of the directives.

Such a link of temporal proximity does not exist between the filing of the current lawsuit and the denial of Plaintiff's overtime pay. This lawsuit was filed in July 2005, and the denial of the overtime pay did not occur until December 2006. Although there is an overlap of time between the lawsuit and the denial of overtime, there appears to be no temporal proximity. However, this is not a fatal flaw. Plaintiff may also demonstrate causation in ways besides temporal proximity, such as the existence of acts of animus.

Plaintiff Guarnieri demonstrated other "antagonism" or "change in demeanor" that could cause a reasonable jury to find "substantial factor" causation. Plaintiff demonstrated general animus in several ways. First, a jury could infer general animus because the directives were only directed to Plaintiff Guarnieri, and no other Duryea police officer. (Trial Tr. vol. 2, 12:23-25, Apr. 15, 2008). Second, Plaintiff Guarnieri offered evidence that Duryea Borough refused to accept his marriage license. (Trial Tr. vol. 2, 69:24-70:25, Apr. 15, 2008.) Third, Plaintiff Guarnieri put forth evidence that Defendants failed to properly put his step-daughter on his health care coverage. (Trial Tr. vol. 2, 71:12-72:8, Apr. 15, 2008.)

Defendants argue that the denial of health and life insurance was not the result of retaliation, as found by the jury. (Doc. 101.) The jury found that these specific actions were not retaliatory actions for purposes of a First Amendment retaliation claim, however, these actions still may be indicative of causation, as causation can be demonstrated by acts of general animus.

Based on the temporal proximity between the fruition of Plaintiff Guarnieri's grievance and the issuance of the directives, and the other evidence of general animus by Defendants towards Plaintiff Guarnieri, a reasonable jury could find "substantial factor" causation. Therefore, the Court will deny Defendants' motion for judgment as a matter of law on these grounds.

IX. Evidence of Ordinary Firmness

Defendants further argue that their renewed motion for judgment as a matter of law should be granted because there was no evidence presented at trial that the alleged retaliatory actions were sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006).

"The effect of the alleged conduct on the employee's freedom of speech need not be great in order to be actionable, but it must be more than *de minimus*." *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) (internal quotation marks omitted). But,

"[e]ven 'an act of retaliation as trivial as failing to hold a birthday party for a public employee,' if 'intended to punish her for exercising her free speech rights,' may be actionable if sufficient 'to deter a person of ordinary firmness' from exercising his or her First Amendment rights." *O'Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (quoting *Suppan v. Dadonna*, 203 F.3d 228, 234-35 (3d Cir. 2000) (citing *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990)). In *O'Connor*, the Third Circuit Court of Appeals noted that the threshold for a First Amendment retaliation claim is very low and "a cause of action is supplied by all but truly de minimus violations." *Id.* (citing *Suppan*, 203 F.3d at 234-35).

In this regard, several pieces of record evidence support the jury's conclusion that the retaliatory acts were sufficient to deter a person of ordinary firmness. The jury found two (2) retaliatory actions-the issuance of the January 21, 2005 directives and the denial of overtime pay. Defendants argue that the issuance of the directives were "reasonable" as per the testimony of Mayor Keith Moss. (Trial Tr. vol. 2, 140-154, Apr. 15, 2008.) Although there is testimony by Mayor Moss that some of the directives may save the Borough some money, this alone does not mean that they are not retaliatory actions, or that the actions would not stop a person of ordinary firmness from exercising his First Amendment rights.

he [sic] January 21, 2005 directives could be found retaliatory and therefore sufficient to deter a

person of ordinary firmness. (Pl.'s Ex. 12.) The jury was presented with the list of directives, which stated:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.

2. You are not to attend council meetings as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed for your department.

4. The dayshift officer must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly written report.

5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be

handed in on Monday.

6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directive which you receive from either the borough solicitor or the borough secretary should be treated as a directive of the borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or the borough solicitor.

7. You will submit a weekly written report to the borough secretary on the following Monday by 1:00 p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the time at which the tasks were performed. In addition, you will include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.

9. The police car is to be used for official business only. Only borough officials and passengers of officials [sic] business only are allowed in the police car.

10. The Duryea municipal building is a smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.

11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00a.m.-3:00p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

(*Id.*) This list of directives was issued the day that Plaintiff Guarnieri returned to work as Chief of the Duryea Borough Police, following a grievance procedure. A reasonable juror could find that this list would deter a person of ordinary firmness from filing a grievance in the future, as the directives could be viewed as restrictive by a reasonable juror.

Similarly, the jury found that Defendants denied Plaintiff Guarnieri overtime pay in retaliation for filing his grievance. The record reflects that Plaintiff Guarnieri was not paid three-hundred and thirty-eight dollars ($338.00) in overtime pay. (Trial Tr. 162:1-3, Apr. 15, 2008.)

Viewing the evidence in the light most favorable to Plaintiff Guarnieri, there is a legally sufficient basis for a reasonable juror to find that

Defendants' actions would deter a person of ordinary firmness from exercising his rights. The test does not require that Plaintiff Guarnieri actually be deterred, but that a person of ordinary firmness be deterred from exercising his First Amendment rights. Therefore, the Court will deny the Defendants' Rule 50 motion on these grounds.

X. Arbitrator's Report

Defendants argue that they should be granted a new trial on the grounds that the Court erred in refusing to allow the Defendants to present and read to the jury certain sections of the arbitrator's report reinstating Plaintiff to his employment. The Court ruled that the arbitrator's report was hearsay, and therefore inadmissible.

Defendants note that when Plaintiff initially sought to have the arbitrator's report introduced, Defendants objected on the grounds of hearsay and lack of personal knowledge by the witness. (Trial Tr. vol. 1, 60:21-61:6, Apr. 14, 2008.) The Court sustained the objection, and did not allow into evidence the findings of the arbitrator on the grounds of hearsay and lack of personal knowledge. (Trial Tr. vol. 1, 60:21-61:6, Apr. 14, 2008.) Defendants later attempted to introduce the report of the arbitrator after the exhibit had been discussed on the cross-examination of Scott Blissman by Plaintiff's counsel. The Court denied Defendants' request to admit the report into evidence. (Trial Tr. vol. 3, 76:12-23, Apr. 16, 2008.)

Defendants' argument is not that the arbitrator's report is hearsay, but rather that the Court's refusal to admit the report of the arbitrator following the cross-examination of Scott Blissman was prejudicial. Defendants argue that the jury did not fully understand the findings of the arbitrator, as they only heard pieces of the arbitrator's report. On this basis, Defendants argue that the Court's refusal to enter the arbitrator's report into evidence is grounds for a new trial. In contrast, Plaintiff argues that because Defendants initially objected to the introduction of the arbitrator's report, they cannot now base a post-trial motion on the failure to include the exhibit.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). As held during trial, the report of the arbitrator is hearsay, and it does not fall within any of the exceptions to the hearsay rule. FED. R. EVID. 802, 803, 804. "Hearsay is not admissible except as provided by [the Federal Rules of Evidence] or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802. If a hearsay statement does not fall within the hearsay exceptions enumerated in Rules 803 and 804, it may still be admissible under the residual exception if the statement has "equivalent circumstantial guarantees of trustworthiness" and the court determines that:

(A) the statement is offered as evidence of a

material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807. But, a statement may not be admitted under the residual exception "unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." FED. R. EVID. 807. In this case, the report of the arbitrator does not properly fall within the residual exception to the hearsay rule. The "interests of justice" would not be served by permitting a legal decision made by an arbitrator before the jury. The arbitrator made his decision on facts other than those submitted into evidence in this case. It would be unduly prejudicial to place before a jury findings by an arbitrator on a similar issue, when the arbitrator's report is hearsay and based on evidence not in this record. Therefore, the report of the arbitrator does not properly fall within the residual hearsay exception.

Defendants further argue that the Court failed to permit the introduction of the arbitrator's

report after the discussion of the report by the Plaintiff, and that the failure to permit the report into evidence was prejudicial. In support, Defendants cite numerous references to Plaintiff Guarnieri's termination. The references listed by Defendants are:

(1) Plaintiff's examination of Alfred Akulonis (Trial Tr. vol. 1, 57-58, 59, 61, 103, Apr. 14, 2008);

(2) Plaintiff's examination of Ann Dommes (Trial Tr. vol. 1, 113, 140, 168, Apr. 14, 2008);

(3) Plaintiff's examination of Joe Mangan (Trial Tr. vol. 2, 15, Apr. 15, 2008);

(4) Plaintiff's examination of Patrick Wall (Trial Tr. vol. 2, 40, Apr. 15, 2008);

(5) Plaintiff's examination of Plaintiff Guarnieri (Trial Tr. vol. 2, 52, Apr. 15, 2008);

(6) Plaintiff's examination of Mayor Keith Moss (Trial Tr. vol. 2, 104, 105, 169, Apr. 15, 2008);

(7) Plaintiff's cross-examination of Scott Blissman (Trial Tr. vol. 3, 57-60, 68-69, 75, Apr. 16, 2008);

(8) Plaintiff's opening and closing statements.

The Court has reviewed the references to the arbitration report listed by the Defendants. In many cases, Defendants did not object to the testimony on grounds of relevance with respect to testimony

regarding Plaintiff Guarnieri's termination or the arbitration. In some instances, the Defendants themselves raised these issues. In many of the instances where Defendants did object, the Court sustained Defendants' objections, and did not permit the prejudicial evidence into the record. (Trial Tr. vol. 1, 61 Apr. 14, 2008; Trial Tr. vol. 2, 15, 40, 104:10-23, Apr. 15, 2008.) The cross-examination of Scott Blissman included the most discussion regarding the termination of Plaintiff Guarnieri and the subsequent arbitrator's report. (Trial Tr. vol. 3, 47, Apr. 16, 2008.) When Defendants objected to the line of questioning regarding Plaintiff Guarnieri's termination, that objection was sustained. (Trial Tr. vol. 3, 49:14-24, Apr. 16, 2008.) Furthermore, the merits of Plaintiff Guarnieri's termination were not at issue in this case. (Trial Tr. vol. 3, 76:12-19, Apr. 16, 2008.) The fact that the termination and the arbitrator's report were discussed at various points by both Plaintiff and Defendants does not require the arbitrator's report to be entered into evidence.

The refusal of the Court to enter the arbitrator's report into evidence does not constitute a significant error of law that would entitle the Defendants to a new trial. For these reasons, the Court will deny Defendants' motion for a new trial.

XI. Motion for Stay of Proceedings to Enforce Judgment

Defendants have filed a motion to stay the enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(b). (Doc. 127.) Rule 62(b)

provides that

> [o]n appropriate terms for the opposing party's security, the court may stay the execution of a judgment-or any proceedings to enforce it-pending the disposition of any of the following motions: (1) under Rule 50, for a judgment as a matter of law; (2) under Rule 52(b), to amend the findings or for additional findings; (3) under Rule 59, for a new trial or to alter or amend a judgment; or (4) under Rule 60, for relief from a judgment or order.

FED. R. CIV. P. 62(b). The Order accompanying this Memorandum disposes of all pending motions pursuant to Rules 50 and 59. Therefore, the Court will deny Defendants' request as moot.

CONCLUSION

For the reasons stated above, Defendants' renewed motion for judgment as a matter of law (Doc. 121), motion for a new trial (Doc. 121), and motion to stay enforcement of the judgment (Doc. 127) are denied.

An appropriate Order follows.

September 2, 2008
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES GUARNIERI, Plaintiff, v. DURYEA BOROUGH, et al., Defendants.	No. 3:05-CV-01422 (JUDGE CAPUTO)

ORDER

NOW, this 2nd day of September, 2008, **IT IS HEREBY ORDERED** that:

(1) Defendants' renewed motion for judgment as a matter of law pursuant to Rule 50 and motion for a new trial (Doc. 121) pursuant to Rule 59 are **DENIED.**

(2) Defendants' motion to stay the enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(b) (Doc. 127) is **DENIED** as moot.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES J. GUARNIERI, JR. Plaintiff, v. DURYEA BOROUGH, et al., Defendants.	Civil Action No. 3:05-CV-01422 (JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is Defendants' Motion for Summary Judgment. (Doc. 39.) For the reasons set forth below, the Defendants' motion will be granted in part and denied in part. Defendants' motion will be granted with respect to the Fourth Amendment claims, which are inapplicable to this case. Defendants' motion will also be granted with respect to the Fourteenth Amendment post-deprivation procedural due process claim, as the Plaintiff received post-deprivation adequate process through the collective bargaining agreement's grievance procedure. Defendants' motion will also be granted

with respect to the Fourteenth Amendment pre-deprivation due process claim, as Plaintiff has failed to demonstrate sufficient evidence of a liberty interest, and the Plaintiff received sufficient process in the post-deprivation hearing. Defendants' motion will be granted with respect to the First Amendment retaliation claim based upon Plaintiff's speech on police and union matters, as Plaintiff has failed to demonstrate sufficient evidence of protected speech. Defendants' motion will be denied with respect to the First Amendment retaliation claim based upon the Plaintiff's filing of the 2003 grievance as questions of material fact exist with respect to this claim. The First Amendment retaliation claim in Count III based upon the right of association will be denied, due to outstanding questions of material fact. Finally, the Court will not address the First Amendment retaliation claim in Count IV, as the Defendants have not moved on that count in their motion.

As a federal question is before the Court pursuant to Title 42 of the United States Code, section 1983, the Court exercises jurisdiction over this action pursuant to section 1331 of Title 28 of the United States Code ("federal question").

BACKGROUND

I. Factual Background

The Plaintiff in this case is Charles J. Guarnieri, Jr., who was appointed Police Chief of Duryea Borough in September of 2000. (Defs.'

Statement of Material Facts in Support of Mot. For Summ. J. ¶ 1, Doc. 40.) Plaintiff was terminated from his position in February of 2003, but reinstated to his position in January of 2005. (*Id.* ¶ 2-3.) Upon his return to work on January 21, 2005, Guarnieri was presented with eleven (11) directives, which he was required to follow as Police Chief of Duryea Borough. (*Id.* ¶ 4.) These directives stated:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.

2. You are not to attend council meetings as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed for your department.

4. The dayshift officer must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly written report.

5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be handed in on Monday.

6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directive which you receive from either the borough solicitor or the borough secretary should be treated as a directive of the borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or the borough solicitor.

7. You will submit a weekly written report to the borough secretary on the following Monday by 1:00 p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the time at which the tasks were performed. In addition, you will include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.

9. The police car is to be used for official business only. Only borough officials and passengers of officials business only are allowed in the police car.

10. The Duryea municipal building is a smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.

11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00a.m.-3:00p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

(Pls. Counterstatement to Defs.' Statement of Material Facts, January 21, 2005 Directives, Doc. 42 Ex. A.) Plaintiff then filed a grievance to these directives pursuant to the Collective Bargaining Agreement on January 29, 2005. (Doc. 40 ¶¶ 5-6.) However, Plaintiff's grievance was not resolved through the grievance procedure. (*Id.* ¶ 8.) The grievance then proceeded to Arbitration. (*Id.* ¶ 9.) The arbitrator issued an award with respect to this grievance on February 15, 2006. (*Id.* ¶ 10.) The arbitrator retained jurisdiction for one-hundred and twenty (120) days following his award in order to assist in the implementation of the award. (*Id.* ¶

11.) On or about June 2, 2006, Defendants issued a set of revised directives to Plaintiff. (*Id.* ¶ 12.) On July 3, 2006, the arbitrator issued his final award. (*Id.* ¶ 13.)

II. Procedural Background

On July 18, 2005, Plaintiff filed a Complaint alleging civil rights violations of his First, Fourth, and Fourteenth Amendment rights. (Doc. 1.) The Defendants filed their Answer on August 29, 2005. (Doc. 8.) The Plaintiff then filed an Amended Complaint on December 21, 2006. (Doc. 28.) On December 29, 2006, the Defendants filed their Answer to the Amended Complaint. (Doc. 43.) Defendants filed the present Motion for Summary Judgment on December 22, 2006. (Doc. 39.) This motion is fully briefed and ripe for disposition.

LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled

to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *See id.* at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.*

Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed.1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the Court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *See White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *See Liberty Lobby*, 477 U.S. at 256-57.

The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

DISCUSSION

Plaintiff alleges that Defendants violated section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

Plaintiff further alleges that Defendants are liable under Section 1983 for violations of their [sic] constitutional rights under the First Amendment, Fourth Amendment, and Fourteenth Amendment based upon their actions under color of law.

I. Fourth Amendment Claim

In the statement of jurisdiction, Plaintiff alleges violations of the "First, Fourth and

Fourteenth Amendments" to the United States Constitution. (Am.Compl. ¶ 15, Doc. 38.) The Fourth Amendment to the United States Constitution, which protects against unreasonable searches and seizures, has no applicability to this case.

II. Count I - Fourteenth Amendment Due Process

In Count I of the Amended Complaint, Plaintiff Guarnieri alleges that he was denied both pre-deprivation and post-deprivation process pursuant to the Fourteenth Amendment. To establish a cause of action for a procedural due process violation, Plaintiff must first prove that a person acting under color of state law deprived him of a protected property or liberty interest; and second, he must show that the procedures available to him failed to provide him with due process of law. *See, Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

A. Post-Deprivation Process

The Third Circuit Court of Appeals has repeatedly held that, "in cases in which 'a due process claim is raised against a public employer, and grievance and arbitration procedures are in place, . . . those procedures satisfy due process requirements 'even if the hearing conducted by the Employer . . . [is] inherently biased .'" *Leneny v. City of Pittsburgh*, 183 F.3d 220, 228 (3d Cir. 1999) (quoting *Dykes v. Southeastern Pa. Trans. Auth.*, 68

F.3d 1564, 1571 (3d Cir. 1995)). Thus, "[i]n order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, *unless* those procedures are unavailable or patently inadequate." *Alvin*, 227 F.3d at 116 (emphasis added).

In response to the January 21, 2005, Plaintiff Guarnieri elected to file a grievance pursuant to the Collective Bargaining Agreement, and proceeded through the grievance process to arbitration. Therefore, post-deprivation process was both available and utilized. Plaintiff has presented no evidence that the arbitration proceedings were inadequate. Furthermore, although violations of post-deprivation process are alleged in the Plaintiff's Amended Complaint, the Plaintiff states in his brief that he is not seeking a claim for post-deprivation due process. Therefore, Defendants' motion for summary on the post-deprivation due process claim will be granted.

B. Pre-Deprivation Process

Plaintiff also alleges that he was denied constitutionally required pre-deprivation procedures pursuant to the Fourteenth Amendment. To establish a cause of action for a pre-deprivation procedural due process violation, the Plaintiff must prove both that a person acting under color of state law deprived him of a protected property or liberty interest; and that the procedures available to him failed to provide him with due process of law. *See, Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

1. Property Interest

"Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). In Pennsylvania, police forces are protected under the Police Tenure Act, 53 P.S. § 811 *et seq.* (protecting police forces of less than three full-time officers) and the section on Civil Service for Police and Firemen, 53 P.S. § 46171 *et seq.* (protecting police forces of three full-time officers or more), both of which provide extensive procedural protections to a police officer. The section on Civil Service for Police and Firemen states that "[n]o person shall hereafter be suspended, removed or reduced in rank as a paid employee in any police force, except in accordance with the provisions of this subdivision." 53 P.S. § 46171. Similarly the Police Tenure Act on removals states that "No person employed as a regular full time police officer . . . shall be suspended, removed or reduced in rank except for the following reasons . . . ." 53 P.S. § 812. Furthermore, both sections create the right to demand a public hearing upon suspension or dismissal and the right to appeal the results of a public hearing to the Pennsylvania Court of Common Pleas. 53 P.S. § 814, 815, 46191. The Civil Service Act also creates the right to request a hearing in the event of a reduction in rank. 53 P.S. § 46191. In this case, the reinstatement of the Plaintiff created a third full-time officer, but the furlough of another officer reduced the force to two

full-time officers. However, it is irrelevant as to which code section applies. Both sections guarantee that a police officer may not be suspended, removed, or reduced in rank except for cause. Since "federal constitutional standards rather than state statutes define the requirements of procedural due process," the state law provisions are irrelevant. *Robinson v. Via*, 821 F.2d 913, 923 (2d Cir. 1987).

The Plaintiff also alleges a property interest which arises from the Collective Bargaining Agreement. Plaintiff cites numerous articles within the agreement, which create a potential property interest. For example, Article 17 acts similarly to the Police Tenure Act, and states that

> No full time police officer covered by this agreement shall be discharged, suspended or demoted except for "just cause" as defined in the civil service provisions of the Pennsylvania Borough Code (53 p.s. Section 46190). It is understood and agreed that *ALL* matters of discipline will be determined through a grievance procedure established by *Article 16* of the current Collective Bargaining Agreement.

(Collective Bargaining Agreement between Duryea Borough and The Duryea Borough Police Department, January 1, 2004 through December 31, 2005, Art. 17, Doc. 47 at 21.) Therefore, a property interest may arise through a reduction in rank or demotion within the bounds of the Collective Bargaining Agreement, as well as within the ambit of state law. Plaintiff's potential property interest is

an interest in his employment and rank as chief of police.

The Court must first consider whether a "reduction in rank" or "demotion" occurred to determine if a property interest exists, and secondly consider whether a hearing is required by federal procedural due process standards. For a property interest to exist, the actions by the Defendants must be a "reduction in rank" or "demotion," as provided by state law. Thus, the Court must determine if the January 21, 2005 directives created a constructive demotion or reduction in rank. The Third Circuit Court of Appeals has considered whether a property interest may be implicated by a constructive demotion based upon the Police Tenure Act. *See Clark v. Twp. of Falls*, 890 F.2d 611, 617 (3d Cir. 1989). In *Clark*, the plaintiff was a police officer who received a change in duties. *Id.* 615-16. The Plaintiff was also issued a number of directives by the Township. *Id.* at 616.

The Third Circuit Court of Appeals noted that an actual rank reduction would be effectuated by a change in title. *Id.* at 618. A constructive reduction in rank would require other traditional indicia of change of rank to determine if a constructive reduction occurred. *Id.* Such indicia include a change in pay, the imposition of duties normally given to employees of lower rank, substantially reduced responsibilities, termination of privileges of rank, and whether the changes were temporary or permanent. *Id.* The court held that the officer did not suffer a constructive demotion, as the changes

were only effective for six (6) weeks. Furthermore, the officer retained numerous police duties. *Id.*

Plaintiff Guarnieri retained his rank as Chief of Police during the relevant time, and therefore did not suffer an actual demotion or reduction in rank. Furthermore, the Plaintiff has not presented evidence that he received a reduction in pay, outside of the denial of overtime opportunities. In any event, the Police Tenure Act does not create a right to overtime opportunities.

The Plaintiff was assigned numerous duties and changes in responsibilities by the January 21, 2005 directives. These duties included: (1) only working and eight hour shift; (2) not being permitted to attend council meetings as a police chief; (3) following the purchase order system; (4) observing arrival and dismissal at a local school; (5) patrolling for four (4) to five (5) hours per day and logging the patrols; (6) submitting a weekly report of daily activities; (7) giving the police department monthly schedule to the borough secretary; (8) only using the police car for official business; (9) monitoring the Duryea municipal building for the no smoking violation; (10) and only being permitted to work the day shift. (January 21, 2005 Directives, Doc. 42 Ex. A)

These directives were a change in procedure from the Plaintiff's previous employment, and differed from the procedure and practice applicable to other officers and previous police chiefs. The Plaintiff was previously present at Borough

meetings prior to his termination, and had a name tag for questions. (Guarnieri Dep. 122: 9-22, Apr. 27, 2006, Doc. 45 Ex. 15.) Only after his return was he restricted from speaking at Borough meetings in his capacity as police chief. If he attended the meetings, the Plaintiff was restricted from answering any questions posed by the citizens. (Guarnieri Dep. 32: 3-11, Doc. 45 Ex. 15.) The Plaintiff also testified that from common knowledge, he knew that his department was the only department required to follow the purchase order system. (Guarnieri Dep. 32:18-24, Doc. 45 Ex. 15.) As for the monitoring of the arrival and dismissal of the local school, the Plaintiff stated that this was not a practice when he was previously employed with the police department. (Guarnieri Dep. 34: 1-9, Doc. 45 Ex. 15.) Although some officers did monitor the school when he could, he was not ordered or directed to do so. (Guarnieri Dep. 35: 21-24, Doc. 45 Ex. 15.) The Plaintiff testified that a police chief has numerous administrative duties, and may not ever patrol. (Guarnieri Dep. 123:3-13, Doc. 45 Ex. 15.) He further testified that no officer had ever been required to do a daily mileage log or weekly report. (Guarnieri Dep. 37: 11-17, Doc. 45 Ex. 15.) The Plaintiff also testified that he personally had never been required to write a written report when previously acting as police chief. (Guarnieri Dep. 113: 4-12, Doc. 45 Ex. 15.) Nor were any officers of lower rank required to fill out such a written report. (Guarnieri Dep. 113: 4-12, Doc. 45 Ex. 15.) Plaintiff similarly testified with respect to the reports to be turned in to the borough secretary. (Guarnieri Dep. 39: 13-24, Doc. 45 Ex. 15.) Furthermore, the

Plaintiff testified that the officer acting as the police chief prior to his return was not restricted to the day shift. (Guarnieri Dep. 47:23-48:13, Doc. 45 Ex. 15.)

Accordingly, these directives changed the Plaintiff's responsibilities and requirements. Furthermore, the January 21, 2005 directives appear to be a permanent addition to the Plaintiff's responsibilities. The Plaintiff testified that other police officers were not similarly restricted.

Such a change in responsibilities may constitute a constructive demotion as per *Clark*. The Court is of the opinion that such a change in responsibilities probably did not create a constructive demotion or reduction of rank. However, even if such actions did constitute a constructive demotion or change in rank, the Plaintiff would not be entitled to a pre-deprivation hearing based upon the three-step balancing test for determining violations of due process.

Presuming the Plaintiff has demonstrated a cognizable property interest, he must satisfy the three-step balancing test as to whether the deprivation occurred without due process of law. The factors to be weighed are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

> interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

In this case, the Plaintiff's private interest is an interest in the duties and responsibilities of his job. This interest is relatively insubstantial compared to other employment-related private interests. For example, the employee in *Loudermill* faced termination. 470 U.S. at 538. Similarly, the Supreme Court noted that a temporary suspension without pay is an insubstantial deprivation compared to the termination of *Loudermill*. *Gilbert v. Homar*, 520 U.S. 924, 932 (1997). Plaintiff's deprivation in this case is even less substantial than a temporary suspension without pay. The Plaintiff here only faced a change in responsibilities. He retained many of his duties, and continued to receive payment for his employment. The Court in *Gilbert* noted that so long as the employee received a sufficiently prompt post-deprivation hearing, the lost income of a suspension would be insubstantial. *Id.* Under the reasoning of *Gilbert*, if the Plaintiff here received a prompt post-deprivation hearing, the loss of duties would be insubstantial.

In comparison, the Government has an interest in determining the duties and responsibilities of its employees. The process currently afforded to the Plaintiff is one of post-deprivation process pursuant to the grievance

procedure of the Collective Bargaining Agreement. The additional process requested by the Plaintiff would be a pre-deprivation hearing prior to the issuance of any directives involving a change in duties or responsibilities. However, there would be numerous fiscal and administrative burdens on the government if there was an additional, pre-deprivation hearing any time changes to an officer's duties occurred. Such a requirement would be burdensome and unnecessary. The Supreme Court specifically stated that due process does not always require a prior hearing. *Id.* at 930. The Court farther held that "where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause." *Id.* (citations omitted).

The final factor requires the Court must consider the risk of erroneous deprivation. By comparison to *Loudermill* and *Gilbert*, the purpose of such a hearing would be to assure that there are reasonable grounds to support the change in the Plaintiff's duties and responsibilities. *See Gilbert*, 520 U.S. at 933-34. The Plaintiff received prompt post-deprivation process, and therefore the risk of erroneous deprivation was low.

In weighing the factors to determine whether due process of law would be satisfied by a pre-deprivation hearing, the Court holds that such a hearing is unnecessary. The Plaintiff received a post-deprivation hearing in the form of an arbitration pursuant to the grievance procedure of the collective bargaining agreement. A pre-

deprivation hearing is unnecessary because the Plaintiff's interest is insubstantial, the government's interest is important, the burden on the government to provide a prior hearing would be great, and a prompt post-deprivation hearing satisfies the requirements of procedural due process.

2. Liberty Interest

"An employment action implicates a fourteenth amendment liberty interest only if it (1) is based on a 'charge against [the individual] that might seriously damage his standing and associations in the community . . . , for example, that he had been guilty of dishonesty, or immorality' or (2) 'imposes on him a stigma of other disability that foreclosed his freedom to take advantage of other employment opportunities'" *Robb v. City of Philadelphia*, 733 F.2d 286, 293-94 (3d Cir. 1984) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)). "Stigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment." *Id.* Thus, in the public employment context, "a plaintiff must show a stigma to his reputation *plus* deprivation of some additional right or interest." *Hill v. Borough of Kutztown*, 455 F.3d 225, 236 (3d Cir. 2006) (quoting *Codd v. Velger*, 429 U.S. 624, 628 (1977)). It is required that the Plaintiff satisfy the "stigma-plus" test in order to successfully demonstrate a liberty interest pursuant to the Fourteenth Amendment.

Plaintiff has stated that he has suffered injury

to his reputation. Plaintiff Guarnieri testified that the January 21, 2005 directives created a stigma to his reputation by assigning him duties consistent with officers of a lower rank. (Guarnieri Dep. 87: 1-6; 88:6-10, Doc. 45 Ex. 15.) At his deposition, Plaintiff Guarnieri discussed that these directives effected his reputation among his fellow officers, as well as with the citizens of Duryea. (Guarnieri Dep. 49:19-51:14, Doc. 45 Ex. 15.) For example, the directives forbid Plaintiff from participating at board meetings as the Chief of Police. (Guarnieri Dep. 31:23-32:11, Doc. 45 Ex. 15.) Thus, the Chief's standing with the community was affected by his inability to communicate with the public in his official capacity at meetings, when he was formerly able to do so. (Guarnieri Dep. 31:23-32:11, Doc. 45 Ex. 15.)

Furthermore, to state a claim for stigma, the plaintiff must demonstrate that the stigmatizing information was 'published' or otherwise disseminated by the public employer to the public at large. *Hill*, 455 U.S. at 236. At this time, evidence has not been presented that the board publicly announced these directives.

The demonstration of damage to reputation alone is insufficient to make out a claim for deprivation of liberty. Even presuming these directives were made public by the Defendants, the reputational injury must be in addition to a "plus" factor. *Hill*, 455 F.3d at 236. In *Edwards v. California University of Pennsylvania*, 156 F.3d 488, 492 (3d Cir. 1998), the Third Circuit Court of

Appeals considered the potential liberty interest of a college professor who was temporarily removed from the classroom setting. The court held that "[s]ince it is undisputed that [the plaintiff] remained employed with pay at all times relevant to this case, his claim is barred by decisions in *Robb* and *Sturm*. While [the plaintiff's] temporary removal from class duties may have further stigmatized him, this action does not constitute a deprivation of employment." *Id.* Thus, the plaintiff's removal from classroom duties did not satisfy a liberty interest. *Id.*

Furthermore, in *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073, 1078 (3d Cir. 1997), the Third Circuit Court of Appeals held that the plaintiff police officer did not demonstrate a liberty interest beyond injury to reputation, as he maintained his official rank. The plaintiff officer argued that he lost potential future employment opportunities due to this reputational injury, which would satisfy the "plus" factor. *Id.* However, the court held that "'possible loss of future employment opportunities is patently insufficient to satisfy the requirement . . . that a liberty interest requires more than mere injury to reputation.'" *Id.* (quoting *Clark v. Twp. of Falls*, 890 F.2d 611, 620 (3d Cir. 1989)).

The Plaintiff has failed to demonstrate evidence of a "plus" factor beyond the injury to his reputation. The Plaintiff maintained his official rank and pay at all times. Therefore, the Plaintiff did not suffer a liberty interest requiring a hearing for the purposes of due process. Even if the Plaintiff did suffer the deprivation of a liberty interest, the

Plaintiff's procedural rights would have been met by the post-deprivation hearing, as stated previously.

Therefore, as there is no material question of fact, and as the Defendants are entitled to summary judgment as a matter of law, the Defendants' motion will be granted as to Count I.

III. Count II - First Amendment Retaliation - Petition and Speech

A Right to Speech

Plaintiff alleges in his Amended Complaint that he engaged in speech relating to "Police and Union matters with Defendants once he was finally reinstated." (Am.Compl.¶ 33, Doc. 38.) To properly allege an action for retaliation based on the First Amendment speech, a public employee must satisfy three elements: (1) the speech was protected and involved a matter of public concern, *Connick v. Myers*, 461 U.S. 138, 147 (1983); (2) the plaintiff's interest in the speech outweighs the state's interest in "promoting the efficiency of the public service it performs," *id.* at 142 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)); and (3) the protected speech was a substantial or motivating factor in the retaliation. *Czurlanis v. Albanes*, 721 F.2d 98, 103 (3d Cir. 1983). The public employer can rebut the claim by demonstrating the same decision would be reached even in the absence of the protected speech. *Id.* at 102.

"A public employee's speech involves a matter

of public concern if it can be 'fairly considered as relating to any matter of political, social or other concern to the community.'" *Baldassare v. State of New Jersey*, 250 F.3d 188, 195 (3d Cir. 2001). Such an inquiry requires the court to consider the content, form, and context of the speech. *Id.* "The content of the speech may involve a matter of public concern if it attempts 'to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials.'" *Id.* (quoting *Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993)).

Plaintiff has failed to present evidence regarding the content, form, or context of the speech. Although the Plaintiff alleges that the speech relates to "Police and Union matters," and that speech occurred after the reinstatement, there is no evidence presented regarding when the speech occurred, the forum where the speech occurred, the recipients of the speech, or the specific content of the speech. Nor does the Plaintiff present evidence as to whether the speech was made with respect to his duties as a public official, or as a private citizen. *Compare Baldassare*, 250 F.3d at 196 (finding that a public employee's speech was protected when made with respect to his official duties because it brought to light a specific wrongdoing on the part of government officials) *with Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998) (holding that speech made with respect to a public official's duties is not protected when the speech did not bring to light wrongdoing on the part of government officials).

Evidence of speech has been presented in the

form of letters written to the Borough Council in 2002, prior to the Plaintiff's termination and the 2003 grievance. However, this speech would be insufficient to present a First Amendment retaliation claim. These letters were written almost three (3) years prior to the January 21, 2005 directives, and therefore, no reasonable juror would be able to find there was causation between the 2002 letters and the 2005 directives. Therefore, the Court will grant the Defendants' motion for summary judgment on Count II's claim for a violation of Plaintiff's freedom of speech.

B. Right to Petition

To establish a First Amendment retaliation claim based upon the right to petition by a public employee, the Court must employ a three-part inquiry. First, the Plaintiff has the burden of establishing that the activity is protected by the First Amendment. *San Filippo v. Bongiovanni*, 30 F.3d 424, 430-31 & n. 7 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Second, the Plaintiff must establish that the protected activity was a substantial factor in the alleged retaliation. *Id.* In order to constitute retaliation within the meaning of the second prong, the action must be sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006). To succeed on this second prong, Plaintiff does not have to show "but-for" causation; rather, he must show only that "the exercise of [his] First Amendment rights played some substantial role in

the relevant decision." *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000).

If Plaintiff satisfies the first two prongs of the inquiry, the burden of persuasion shifts to the defendant, who "may defeat plaintiff's claim by demonstrating that the same action would have taken place even in the absence of the protected conduct." *San Filippo*, 30 F.3d at 430-31 & n.7. This framework is borrowed from *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, in which the defendant must demonstrate the third prong by a preponderance of the evidence. *See* 429 U.S. 274, 287 (1977).

1. Protected Activity

The First Amendment's Petition Clause protects a public employee from retaliation for filing non-sham lawsuits, grievances, and other petitions directed at the government or its officials. *See San Filippo v. Bongiovanni*, 30 F.3d 424, 439 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995). The filing of a formal petition is protected without regard to whether the petition addresses a matter of public concern. *Id.* at 442. Such a petition is protected as long as it is filed in good faith, and the petition is not a sham. *Id.* Formal mechanisms include a collective bargain agreement's grievance procedure, as noted in *San Filippo*. *Id.* at 442. There is no evidence presented that Plaintiff's 2003 grievance pursuant to the collective bargaining agreement was a "sham." As a good faith grievance pursuant to a collective bargaining agreement has specifically been protected

within the meaning of the Petition Clause by the Third Circuit Court of Appeals in *San Fillipo*, Plaintiff has presented sufficient evidence of a protected activity.

2. Ordinary Firmness and Substantial Factor

The second element considers whether the alleged retaliatory actions were sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006). "The effect of the alleged conduct on the employee's freedom of speech need not be great in order to be actionable, but it must be more than *de minimus*." *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) (internal quotation marks omitted). However, "[e]ven 'an act of retaliation as trivial as failing to hold a birthday party for a public employee,' if 'intended to punish her for exercising her free speech rights,' may be actionable if sufficient 'to deter a person of ordinary firmness' from exercising his or her First Amendment rights." *O'Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (quoting *Suppan v. Dadonna*, 203 F.3d 228, 234-35 (3d Cir. 2000) (citing *Rutan v. Republican Party*, 497 U.S. 62, 76 n. 8 (1990)). The Third Circuit Court of Appeals further held that the threshold for a First Amendment retaliation claim is very low and "a cause of action is supplied by all but truly de minimus violations." *Id.* (citing *Suppan*, 203 F.3d at 234-35).

The retaliatory act alleged to Plaintiff's filing of the 2003 grievance includes the issuance of the January 21, 2005 directives. Plaintiff also testified that the Defendants retaliated against him by creating barriers to his receiving health and life insurance for his wife. In Defendants' brief, they argue that the January 21, 2005 directives did not deter Guarnieri from exercising his First Amendment rights, and that Guarnieri did in fact file a second grievance challenging the directives eight (8) days after their issuance. However, Defendants misconstrue the "ordinary firmness" standard. The standard applied for First Amendment retaliation is an objective standard dealing with a person of ordinary firmness, and does not consider the firmness of the particular Plaintiff. The question is whether a person of ordinary firmness would be deterred from further exercising his or her right to petition pursuant to the collective bargaining agreement.

There is a question of material fact as to whether a set of directives such as these would deter a person of ordinary firmness from exercising his rights under the collective bargaining agreement. A reasonable factfinder could determine that the January 21, 2005 directives were sufficient "to deter a person of ordinary firmness" from exercising his First Amendment rights, and therefore summary judgment is inappropriate at this time.

Similarly, there is a question of material fact as to whether barriers to receiving health and life insurance policies for a spouse would deter a person

of ordinary firmness from exercising his First Amendment rights. Plaintiff testified that the Borough refused to accept his marriage license, which created problems with his insurance. (Guarnieri Dep. 116: 8-21, Doc. 45 Ex. 15.) He further testified that no other officer was required to provide a copy of their marriage license. (Guarnieri Dep. 116: 8-21, Doc. 45 Ex. 15.) A reasonable factfinder could determine that barriers to receiving his health and life insurance were sufficient "to deter a person of ordinary firmness" from exercising his First Amendment rights, and therefore summary judgment is inappropriate at this time.

Furthermore, the second prong of the First Amendment retaliation inquiry requires the Plaintiff to demonstrate that the 2003 grievance was a substantial factor in the issuance of the January 21, 2005 directives. Defendants claim that the Arbitrator already determined the purpose of the January 21, 2005 directives, and therefore the 2003 grievance procedure cannot be a substantial factor.

However, the Supreme Court held in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), that federal courts are not obligated to accord res judicata or collateral estoppel to an arbitrator's decision. In *McDonald*, the plaintiff police officer brought a grievance through the collective bargaining process after his termination. *Id.* at 285-86. The arbitrator ruled against McDonald, but he did not appeal the decision. *Id.* at 286, 287. Rather, he filed a § 1983 action for violations of his First Amendment rights. *Id.* at 287.

The Court then considered whether the arbitration pursuant to the collective bargaining agreement obligated the federal court to apply res judicata or collateral estoppel to the § 1983 claims. The Supreme Court defined collateral estoppel, holding that when a "court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" *Id.* at 287 n. 5 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

The Court noted that "arbitral fact-finding is generally not equivalent to judicial factfinding," and therefore "in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial." *Id.* at 291, 292. Thus, the Court held that

> according preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide. Therefore, we hold that in a § 1983 action, a federal court should not afford res judicata or collateral estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement.

Id. The Defendants argue in their brief that the January 21, 2005 directives were not a substantial factor, as the arbitrator found that "the two (2) main reasons for the Borough issuing directives . . . were

for: (a) financial reasons . . . and (b) operational reasons." (In the Matter of the Arbitration between Duryea Borough Police Department and Borough of Duryea, AAA Case No. 14 300 00419 05 RVB, Implementation of Award, Doc. 40 Ex. B at 2-3.) Essentially, Defendants argue that collateral estoppel exists as to the rationale for the January 21, 2005 directives, and therefore the 2003 grievance cannot be a substantial factor. However, the Supreme Court does not permit collateral estoppel based upon arbitration pursuant to a collective bargaining agreement. Although the arbitrator "'decided an issue of fact or law necessary to its judgment,' "this decision does not preclude this Court from considering the rationale behind the January 21, 2005 directives, as a collective bargaining agreement's arbitration does not create collateral estoppel for a later § 1983 claim. *McDonald*, 466 U.S. at 287 n.5 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

To succeed on the substantial factor element, Plaintiff does not have to show "but-for" causation. *Suppan*, 203 F.3d at 236. Defendants Dommes and Morreale testified that the council fought hard against Plaintiff Guarnieri in his 2003 grievance. (Dommes Dep. 48:5-8, Apr. 28, 2006, Doc. 45 Ex. 13; Morreale Dep. 36:6-37:16, Apr. 28, 2006, Doc. 45 Ex. 12.) Furthermore, Defendant Morreale further stated that she was of the opinion that the council was not in favor of Plaintiff Guarnieri returning. (Morreale Dep. 36:21-37:2, Doc. 45 Ex. 12.) Furthermore, deposition testimony by Mayor Keith Moss reflects his belief that the directives were

issued "Because of him filing the grievance and that, and that he won his job back. I think they just wanted to do something to him." (Moss Dep. 11:3-7, July 18, 2006, Doc. 45 Ex. 17.) Plaintiff Guarnieri received the January 21, 2005 directives on the first day of his return after the 2003 grievance procedure. (Guarnieri Dep. 22:11-18, Doc. 45 Ex. 15.) Furthermore, these directives were only issued to Plaintiff Guarnieri, and the other officers were not issued similar directives. (Guarnieri Dep. 39:13-24, Doc. 45 Ex. 15.) Therefore, there is question of material fact as to whether the protected activity was a substantial or motivating factor in issuance of the January 21, 2005 directives.

Similarly, there is a question of material fact as to whether the barriers to receiving health and life insurance were caused in retaliation for the Plaintiff's actions. There is a question of material fact as to whether Plaintiff's actions were a substantial factor in the alleged retaliation. A reasonable factfinder could hold that the Defendants created barriers to receiving life and health insurance in retaliation for Plaintiff's actions.

3. Same Action in Absence of Protected Conduct

After consideration of the first two elements of the retaliation test, the burden of persuasion shifts to the defendant, who "may defeat plaintiff's claim by demonstrating that the same action would have taken place even in the absence of the protected conduct." *San Filippo*, 30 F.3d at 430-31 & n.7.

The Defendants suggest in their brief that the directives were "reasonably related to the legitimate goals that it was attempting to accomplish and that they were within its rights as an employer." (Defs.' Brief in Supp. of Mot. for Summ. J. at 14, Doc. 41.) Thus, Defendants argue that the directives would have been issued even in the absence of the Plaintiff's petition. For example, Defendant Morreale testified in her deposition that the Chief's overtime was limited in Directive 1 because "financially, they were spending more money than was budgeted for the salaries, so it created a budget problem." (Morreale Dep. 43: 13-15.) As to Directive 2, Morreale similarly opined that Plaintiff was restricted from attending the council meetings as chief of police because "I think council felt that sometimes the meetings run a couple of hours and there was no involvement on [Chief Guarnieri] and we were trying to save money." (Morreale Dep. 164:25-165:3.) In Directive 3, Plaintiff was required to follow the purchase order system. Defendant Morreale noted that the Street Department had a purchase order policy procedure, which it followed from the time of the institution of the purchase order procedure. (Morreale Dep. 42:17-43:12.) She further testified that she believed that Plaintiff Guarnieri received a copy of the purchase order policy. (Morreale Dep. 42: 11-15.) Furthermore, Morreale testified that Plaintiff was not the only department head required to get signed purchase orders, stating that "Each department head was responsible personally to get the purchase orders signed, and they were just telling him that in writing in the

directives when he came back." (Morreale Dep. 171: 10-13.) Directive 4 required that Plaintiff go to Holy Rosary School at the arrival and dismissal of the school day. In response to questioning on this directive, Defendant Morreale testified that

> We had had some problem with the truck traffic on Stephenson Street, and we had a letter at a council meeting about the safety of the children at the Holy Rosary School. And the officer in charge had gone done there every day, and the people at the school appreciated it so they just wanted the chief to know and they wanted the practice to continue.

(Morreale Dep. 172:25-173:7.) Defendant Morreale also testified as to the rationale for Directive 5, requiring the Plaintiff to patrol for four (4) to five (5) hours per day. She noted that "while [Plaintiff] was off, the officer in charge patrolled a lot and people liked seeing the police car and they wanted him visible to the public." (Morreale Dep. 175: 14-16.)

Defendant Dommes also testified as to the rationale behind the directives. She testified that

> we knew we had a problem with Chief Guarnieri following orders. Prior to his termination he would not listen to myself, to the borough secretary, to the solicitor . . . [our solicitor] said you can put directives to him in order for him to-for it to be clear what [us] as employers want him to do as an

employee.

(Dommes Dep. 95:23-96:5.)

Therefore, the Defendants have presented some evidence demonstrating that same action would have taken place even in the absence of the protected conduct, in the case of at least some of the directives. However, there is a question of material fact as to whether the actions would have taken place in the absence of Plaintiff's petition. Viewing this evidence in the light most favorable to Plaintiff, the Court concludes that there are issues of material fact as to whether that [sic] the alleged activity would deter a person of ordinary firmness, if the protected activity was a substantial factor in the alleged retaliation, and if the same action would have occurred in the absence of the protected conduct. Because of the factual disputes surrounding the second and third prong, Defendants' motion for summary judgment on Count II's violation of the right to petition will be denied.

IV. Count III - First Amendment Retaliation - Association

Plaintiff further alleges that the Defendants violated his First Amendment rights by retaliating against him for his affiliation with the union, the Fraternal Order of Police, and his assistance in union matters. In order to show a violation of Plaintiff's right to freedom of association, Plaintiff Guarnieri must prove that the Borough retaliated against him because of his union activities.

To properly allege an action for associational retaliation, a public employee must satisfy three elements: (1) that plaintiff engaged in conduct or speech protected by the First Amendment; (2) that the government responded with retaliatory action sufficient to deter a person of ordinary firmness from exercising his First Amendment rights; and (3) that the protected activity caused the retaliation. *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006).

A Protected Activity

Union membership is protected by the right to association within the First Amendment. *Service Employees Int'l Union, AFL-CIO v. County of Butler, Pa.*, 306 F.Supp. 1080, 1082 (W.D.Pa. 1969) (citing *Thomas v. Collins*, 323 U.S. 516 (1945)). The Supreme Court has

> recognized that "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means," *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 933 (1982), and our recognition of this right encompasses the combination of individual workers together in order [to] better assert their lawful rights. *See e.g. Railroad Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964).

Lyng v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America,

UAW, 485 U.S. 360, 364 (1988).

At this time, a circuit split exists regarding whether the protected activity also must be a matter of public concern to satisfy the first element when the protected activity is association. *See Sanguini v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393 (3d Cir. 1992). In *Sanguini*, the Third Circuit Court of Appeals acknowledged the circuit split, but declined to decide whether *Connick* applied to freedom of association cases. *Id.* at 400 (noting that the Sixth and Seventh Circuit Courts of Appeals apply the *Connick* test to freedom of association, but that the Eleventh Circuit Court of Appeals refused to do so).

In *Van Compernolle v. City of New Zealand*, No. 06-1904, 2007 WL 2015985, at *7 (6th Cir. July 9, 2007), the Sixth Circuit Court of Appeals discussed *Boals v. Gray*. The court recognized that in *Boals*, there was " 'no doubt that an employee who is disciplined solely in retaliation for his membership in and support of a union states a valid First Amendment claim under *Connick* and *Pickering*.' " *Id.* (quoting *Boals*, 775 F.2d at 693). The court further addressed the difference between being a union member and acting or speaking as one. *Id.* The court thus distinguished the two, stating that "while a government employer cannot take adverse action against an employee solely because that employee is a union member, the First Amendment does not protected union-related speech . . . unless that speech . . . addresses a matter of public concern." *Id.* (citing *Boals*, 775 F.2d at 693).

Mere membership in a union is distinguishable from speech or activities as part of a union. Although speech or actions may require the speech to be a matter of public concern, membership alone does not require a matter of public concern. Therefore, Plaintiff's membership in a union does not require the public concern test, and the membership is protected within his First Amendment rights. *See, e.g. Glass v. Snellbaker*, Civ. A. No. 05-1971(JBS), 2007 WL 1723472, at *5 n.2 (D.N.J. June 14, 2007) ("When a public employee's organization performs some activities that are of public vonernc [sic] and some that are not, it appears that if an employer . . . punishes the right to associate . . ., then the employer also incidentally burdens protected rights . . . .")

B. Ordinary Firmness and Substantial Factor

The Plaintiff asserts that the January 21, 2005 directives were instituted in retaliation for the Plaintiff's association with the Fraternal Order of the Police. As stated previously, there is a question of material fact as to whether the retaliation would deter a person of ordinary firmness from exercising his First Amendment rights. In this count, the question is whether the directives would deter a person of ordinary firmness from participating as a member of a union. This is a question of material fact for the jury. Furthermore, there is a question of material fact to whether Plaintiff's membership in the union was a substantial factor in the alleged retaliation. Plaintiff does not have to show "but-for"

causation. *Suppan*, 203 F.3d at 236. The Defendants likely were aware of Plaintiff's membership in the Fraternal Order of the Police, as he had pursued a grievance pursuant to the Collective Bargaining Agreement against Duryea Borough for his termination. Therefore, a reasonable juror could find that the January 21, 2005 directives were a substantial factor in the alleged retaliation. As there are questions of fact with respect to the second prong of the retaliation test, the Court need not address the third prong.

V. Count IV - First Amendment Retaliation - Petition

The Defendants' motion for summary judgment does not mention or request summary judgment on Count IV. Therefore, the Court will not address Count IV at this time.

CONCLUSION

Construing the facts in a light most favorable to Plaintiff, the Court finds that Defendants' motion for summary judgment should be granted in part and denied in part. Defendants' motion will be granted with respect to the Fourth Amendment claims, which are inapplicable to this case. Defendants' motion will also be granted with respect to the Fourteenth Amendment pre-deprivation and post-deprivation procedural due process claims, as the Plaintiff adequate process through the collective bargaining agreement's grievance procedure. Defendants' motion will be granted with respect to

the First Amendment retaliation claim based upon Plaintiff's speech on police and union matters, as Plaintiff has failed to demonstrate sufficient evidence of protected speech. Defendants' motion will be denied with respect to the First Amendment retaliation claim in Count II based upon the Plaintiff's filing of the 2003 grievance as questions of material fact exist with respect to this claim. Defendants' motion will also be denied as to Count III's First Amendment retaliation claim based upon the right of association due to outstanding questions of material fact. Finally, as the Defendants have not moved on Count IV in their summary judgment motion, that Count will remain.

An appropriate order shall follow.

November 15, 2007
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES GUARNIERI, Plaintiff, v. DURYEA BOROUGH, et al., Defendants.	No. 3:05-CV-01422 (JUDGE CAPUTO)

ORDER

NOW, this 15th day of November, 2007, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment (Doc. 39) is **GRANTED** in part and **DENIED** in part as follows:

1. Defendants' motion will be **GRANTED** with respect to the Fourth Amendment claims.

2. Defendants' motion will be **GRANTED** with respect to the Fourteenth Amendment claims for pre-deprivation and post-deprivation process in Count I.

3. Defendants' motion will be **GRANTED** with respect to the First Amendment claim for violation of the right to free speech in Count II.

4. Defendants' motion will be **DENIED** with respect to the First Amendment claim for violation of the right to freedom of petition in Count II.

5. Defendants' motion will be **DENIED** with respect to the First Amendment claim for violation of the right to free association in Count III.

6. Plaintiff's claim for violation of the right to freedom of petition pursuant to the First Amendment in Count IV will remain, as Defendants failed to move for its dismissal in their motion.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3949

CHARLES J. GUARNIERI, Jr.

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AL AKULONIS, Individually and in his Official Capacity as Councilman,

Appellants

No. 08-4428

CHARLES J. GUARNIERI, Jr
Appellant

v.

DURYEA BOROUGH; DURYEA BOROUGH COUNCIL; ANN DOMMES, Individually and in her Official Capacity as Council President; LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary; FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman; EDWARD ORKWIS, Individually and in his Official Capacity as Councilman; ROBERT WEBB, Individually and in his Official Capacity as Councilman; AUDREY YAGER, Individually and in her Official Capacity as Councilwoman; JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman; AL AKULONIS, Individually and in his Official Capacity as Councilman.

SUR PETITION FOR REHEARING

Present: Scirica, Chief Judge, Sloviter, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan and Hardiman, Circuit Judges

The petition for rehearing filed by Appellants/Cross-Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: March 4, 2010
CRG/cc: Cynthia L. Pollick, Esq.
Karoline Mechalchick, Esq.
Joseph A. O'Brien, Esq.

No. 09-1476

Supreme Court, U.S.
FILED
SEP 07 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,

Petitioners,

v.

CHARLES J. GUARNIERI, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the right of access of the courts embodied in the Petition Clause protect

> (a) an individual who while not a public employee prevailed in an arbitration proceeding against a city, who later becomes a city employee and is retaliated against, or
>
> (b) a public employee who is retaliated against by a city for having filed an action in federal court under section 1983,

without regard to whether the subject matter of that arbitration and lawsuit was a matter of public concern?

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STATEMENT

This litigation concerns respondent Guarnieri's service as Police Chief of the Borough of Duryea, Pennsylvania. Duryea is a small town with only two full time police officers; the Police Chief spends a substantial portion of his time doing regular police work, rather than administration. Under the applicable borough ordinance the seven member Borough Council has the authority to hire and fire the Police Chief; supervision of the Chief, on the other hand, is the responsibility of the Borough's Mayor. The relationship between the Borough and the Police Chief is governed in part by a collective bargaining agreement between the Borough and Duryea Police Association, which is represented by the Fraternal Order of Police. That agreement provides, in certain circumstances, for a grievance process that can lead to binding arbitration.

Guarnieri was initially hired in September 2000. In February 2003 the Borough Council voted to dismiss Guarnieri, an action precipitated in part when Guarnieri rejected a request from the Council Chair that he lobby the mayor to sign a proposed ordinance that was unrelated to the Police Department.[1] Two weeks after his dismissal Guarnieri filed

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[1] D.Ex. 29 (Arbitration Decision of Dec. 28, 2004), at 11:

> [C]ouncil's attempt to reorganize the Sewer Authority may have been a critical turning point. Ms. Dommes [the Council Chair] and Mr. Guarnieri concurred that she had asked him to intervene with the Mayor in an

(Continued on following page)

a grievance challenging his termination. The Mayor, who had no power to overturn that dismissal, nonetheless indicated his support for Guarnieri.[2] The dispute ultimately was referred for binding arbitration under the terms of the applicable collective bargaining agreement.

The arbitral process, conducted under the auspices of the American Arbitration Association, had many of the facets of a trial. The dispute was heard by the arbitrator over several days of hearings in August and September 2004, with a number of witnesses being examined and cross-examined, and a range of documents being presented. Both sides were represented by counsel; Guarnieri was represented by counsel for the union. Each side submitted post-hearing briefs. In December 2004 the arbitrator issued a detailed 23 page opinion which concluded that the dismissal was improper. The arbitrator ordered that Guarnieri be reinstated with back pay. Guarnieri returned to work on January 21, 2005.

---

effort to prevent a veto of Council's bill. Mr. Guarnieri refused the request, and the Mayor vetoed the bill. Although Mr. Guarnieri had wanted to keep himself and the Police Department out of politics, it did prove impossible. Mr. Guarnieri and the Mayor were now seen as allies, and Mr. Guarnieri made no effort to dispel that view. As relations between the Mayor and Council deteriorated, so, too, did relations between Mr. Guarnieri and Council.

[2] *Id.* at 17 ("Mayor Moss replied ... 'I wish to advise you that I agree with you in this matter. At this time I am advising you to proceed to the next step of the grievance procedure'.").

The Retaliatory Directives

Guarnieri alleged, and a jury ultimately found, that when Guarnieri returned to work the Borough Council immediately retaliated against him for having filed the grievance and pursued the successful arbitration. The Council retaliated by adopting an unprecedented set of "directives" controlling the actions of the Police Chief. Some of the directives had the effect of limiting how much the Chief could earn; for example, it forbade Guarnieri to work or earn overtime. Others constrained the Chief's ability to do his job; the Chief was ordered, for example, to leave work and "go home" at 3 p.m. each day, an order that applied regardless of whether at that point in time the Chief might be dealing with an emergency, conducting an investigation, or making an arrest.[3]

Guarnieri initiated two separate challenges to these directives. On January 29, 2005, Guarnieri filed a new grievance under the collective bargaining agreement, this one challenging the disputed directives. That grievance ultimately led to binding arbitration at the request of the Police Union. In July 2005, Guarnieri commenced the instant action in federal court, alleging inter alia that the directives were the result of an unconstitutional purpose to

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[3] In a number of instances a directive was disputed because it provided that the Police Chief would be personally responsible for any violation of a rule by one of his subordinates, a form of strict liability which Guarnieri claimed was not imposed on other department heads. D.Ex. 18 (P.Ex. F), at 19, 23.

retaliate against him for pursuing the earlier grievance and arbitration, retaliation which Guarnieri asserted violated the Petition Clause of the First Amendment.

In a decision in February 2006 regarding this second grievance, the arbitrator sustained many of the challenges raised by Guarnieri and the Union to the disputed directives. The arbitrator concluded that a number of the directives were invalid to the extent that the Borough Council had usurped the role of the Mayor in attempting to supervise the work of the Police Chief.* A subsequent arbitration decision

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* D.Ex. 18 (P.Ex. F) (Arbitration Decision of Feb. 15, 2006), at 18-24:

> [T]he Mayor may determine that the Chief is needed to perform duties [for more than eight hours in a day, or 40 hours in a week] when an additional officer is required and cannot be procured.... [I]t is clearly beyond the authority of Borough Council, as its attorney acknowledged, and the Borough President agrees, to require that any employee must "go home" at the end of his or her shift.
>
> * * *
>
> [T]o the extent that the Chief of Police might be required to attend a Council meeting(s), ... he must be compensated.
>
> * * *
>
> The absolute requirement [that a particular officer be present at a specified school at certain hours] may interfere with other duties required of the ... officer or the Mayor's direction of the manner in which the persons assigned to the various ... ranks ... shall perform their duties.

(Continued on following page)

regarding this grievance, in July 2006, resolved a number of issues that were not fully addressed in the February 2006 decision. The combined effect of these arbitration decisions was to resolve the dispute between the Borough Council and Guarnieri regarding the conditions governing the work of the Police Chief, and thus mooted any request in the section 1983 action for injunctive relief regarding the directives. The section 1983 action challenging the original directives proceeded to discovery and trial with regard to Guarnieri's claims for monetary relief arising out of the retaliatory directives. A jury found that the Borough Council had imposed the disputed directives for the purpose of retaliating against Guarnieri for having pursued the earlier grievance and arbitration regarding his 2003 dismissal. The jury awarded Guarnieri $45,000 in compensatory damages and $24,000 in punitive damages.

---

* * *

[T]o require the Chief to be out of his office 4-5 hours per day, on patrol, may not allow him time to perform other critical police duties without incurring overtime.

* * *

[I]f the Mayor determines there is an operational necessity to work a different shift [than the day shift mandated by a Directive] the Chief may be so assigned....

Retaliatory Denial of Overtime

In December 2006 the Borough Council refused to pay Guarnieri overtime for fourteen and one-half hours he had worked. Guarnieri alleged, and a jury later found, that the Borough did so to retaliate against him for having filed the instant section 1983 action.

Guarnieri challenged this denial of overtime pay in two ways. First, Guarnieri amended his pending section 1983 complaint, adding a new claim which alleged that the retaliatory denial of overtime pay violated his rights under the Petition Clause of the First Amendment. Second, Guarnieri complained about the denial to the Wage and Hour Division of the United States Department of Labor, asserting that the denial of overtime violated the federal Fair Labor Standards Act. The Department of Labor investigated Guarnieri's complaint, and concluded that the denial of overtime pay violated the FLSA. The Borough entered into a written agreement with the Department of Labor in which it promised to pay Guarnieri $338.53 for the overtime he had worked.

The Borough, however, failed to pay Guarnieri that $338.53. The section 1983 claim therefore proceeded to trial on this claim. The jury found that the Council's original denial of overtime was the result of a retaliatory purpose. The jury awarded Guarnieri on this claim $358 in damages; the jury also awarded punitive damages on this claim.

The Appeal

On appeal the Borough argued that none of the proven retaliatory conduct violated the Petition Clause. The Borough contended that the Petition Clause does not forbid reprisals against public employees for petitioning activity unless that activity involves a matter of public concern. The Borough argued specifically that the protections accorded to public employees by the Petition Clause are the same as the protections accorded by the Free Speech Clause of the First Amendment, and are thus subject to the limitation in *Connick v. Myers*, 461 U.S. 138 (1983), which requires a plaintiff to show that the assertedly protected activity involved a matter of public concern.

The Third Circuit rejected this contention. The court of appeals applied that circuit's earlier decision in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir.1994). *San Filippo* had concluded that when a public employee files a lawsuit, or invokes some analogous formal remedial mechanism, the employee is protected by the right of access to courts embodied in the Petition Clause. 30 F.3d at 433-43. This Court's decisions regarding the right of access to courts has never been limited to lawsuits (or other similar proceedings) regarding matters of public concern. Under *San Filippo* the *Connick* public concern requirement remains applicable in the Third Circuit to all public employee Petition Clause claims

that do not involve access to courts or other similar formal remedial mechanisms.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT

The narrow issue raised by the decision in *San Filippo* does not warrant review by this Court. Because of the limited scope of that decision, the overwhelming majority of First Amendment claims by public employees in the Third Circuit continue to be governed by the public concern requirement of *Connick*. Even where *San Filippo* applies, that rule regarding the right of public employees to access to courts often is not outcome determinative; frequently cases to which this standard has been applied would in any event have satisfied the public concern requirement, or involved retaliatory acts that were already illegal under some other provision of law. The question presented is thus of insufficient practical importance to warrant expenditure of this Court's scarce resources.

(a) Under *San Filippo* First Amendment claims of public employees remain subject to the *Connick* public concern standard except where the employee's protected activity was filing a lawsuit or invoking some similar "formal mechanism of redress." *Foraker v. Chaffinch*, 501 F.3d 231, 236 (3d Cir.2007).

This narrow rule is expressly rooted in this Court's repeated decisions that the Petition Clause guarantees access to the courts. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), the Third Circuit noted, this Court held that "[t]he right of access to the courts is ... one aspect of the right to petition." *San Filippo*, 30 F.3d at 436. The Third Circuit relied as well on *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 741 (1983), which also held that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." See *San Filippo*, 30 F.3d at 437 (quoting *Bill Johnson's*). Neither *California Motor Transport* nor *Bill Johnson's Restaurants* suggested that the lawsuits at issue in those cases did (or needed to) involve matters of public concern. This Court's decisions in those cases held in light of the Petition Clause that all lawsuits – not merely lawsuits regarding issues of public concern – could not give rise to a claim under the federal anti-trust law or under the National Labor Relations Act, at least absent a showing that that lawsuit was a mere sham. The Third Circuit correctly concluded that the right of access to the courts is not limited to plaintiffs who want to use litigation to express their views on some public debate. 30 F.3d at 441.

Because the Third Circuit rule derives from the right of access to the courts, it is expressly limited to invocation of some "formal mechanism for redress of grievances," *San Filippo*, 30 F.3d at 440 n.18, such as a lawsuit or a formal grievance and arbitration

process under a collective bargaining agreement. This Court's decisions make clear that the Petition Clause applies to a far wider range of activities, such as demonstrations or other public protests,[5] that would fall outside the narrow rule in *San Filippo*. *San Filippo* made clear, for example, that a simple letter from a worker invoking no such mechanism would continue to be governed by *Connick*.

> [I]f the "petition" at issue w[ere] simply a letter imposing on the government no obligation to respond, it w[ould] properly [be] analyzable under the conventional *Connick* rubric applicable to speech.

30 F.3d at 439.

Most complaints and statements by government workers simply do not fall within this narrow rule regarding access to the courts and similar formal remedial processes. Of the four Third Circuit cases cited by petitioners, half actually rejected a plaintiff's claim precisely because it did not involve such a formal mechanism. *Foraker*, 501 F.3d at 237 ("the plaintiffs' complaints up the chain of command did not constitute petitioning activity. [The plaintiffs] complained internally; they did not petition a state agency qua agency. They appealed to their employer, which also happened to be a state agency, through informal channels."); *Hill v. Borough of Kutztown*,

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[5] E.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

455 F.3d 225, 242 n.24 (3d Cir.2006) ("Hill appears to allege that his report to the Borough Council could be protected ... as 'petitioning activity.' ... We have never held, however, that a report of a supervisor's misconduct to a legislative body when the legislative body is also the reporter's employer constitutes 'petitioning activity.'") The Petition points to the denial of rehearing en banc in *Foraker* as an indication that the Third Circuit is implacably committed to an overboard interpretation of the Petition Clause. (Pet. 28). In fact, however, rehearing was sought in *Foraker*, not by the defendants, but by the unsuccessful plaintiffs, who objected that the panel had applied the Petition Clause in an unduly narrow manner.[6]

District courts in the Third Circuit have repeatedly rejected Petition Clause claims by public employees because their actions did not involve invocation of some formal remedial mechanism.

> [T]he Petition Clause does not protect informal grievances such as memoranda, letters, and verbal complaints.... Plaintiff['s] ... grievances consisted of verbal complaints and internal memoranda, which are not protected by the Petition Clause.

Perna v. Township of Montclair, 2006 WL 2806276 at *6 (D.N.J.).

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[6] Appellants' Petition for Rehearing En Banc or By The Panel, No. 06-4086 (3d Cir.), at 11-14.

> Plaintiff's speech at issue does not implicate the Right to Petition ... because his meeting with union representatives and [an agency official] is not in the nature of a formal grievance procedure.... Plaintiff expressed his speech in many informal settings, including letters, phone calls, and meetings....

Cooper v. Cape May County Bd. of Social Services, 175 F.Supp.2d 732, 746 (D.N.J.2001); see *Price v. MacLeish*, 2006 WL 2346430 at *9 (D.Del.) ("Plaintiffs' 'petitions' up the chain of command were not through a formally-adopted mechanism.... Clearly, the plaintiffs' petitioning activities do not fall under the safe harbor provided by *San Filippo*"); *Bradshaw v. Township of Middletown*, 296 F.Supp.2d 526, 546 (D.N.J.2003) ("[i]nformal conduct such as letters, phone calls, memoranda and meetings" are not protected); *Karchnak v. Swatara Township*, 2009 WL 2139280 at *9 n.11 (M.D.Pa.) (actions not protected because plaintiff did not personally file or participate in lawsuit); *Baranowski v. Waters*, 2008 WL 728366 at *25 (W.D.Pa.) ("Baranowski's statement ... did not constitute petitioning activity. Baranowski complained internally, speaking only with his superiors.... A public employee's informal complaints are not transformed into petitioning activity merely because he or she happens to be employed by the government"); *Livingston v. Borough of Edgewood*, 2008 WL 5101478 at *3 (W.D.Pa.) (soliciting union to file a grievance insufficient); *Miller v. Weinstein*, 2008 WL 4279817 at *21 (W.D.Pa.) (email appeal to employer insufficient).

(b) The petition repeatedly[7] describes the Third Circuit rule in a manner that omits that rule's narrow limitation to petitions invoking some formal remedial mechanism. The Question Presented, for example, describes the Third Circuit as

> holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern....

(Pet. i). "[T]he Third Circuit refused to extend the public concern requirement that this Court applied to free speech retaliation claims in *Connick* to similar petition claims." (Pet. 4). In fact, as noted above, *San Filippo* expressly does apply the *Connick* public concern requirement to petitions that do not involve a formal remedial mechanism. Petitioners object that anomalous results would ensue if the Petition Clause interpreted "to protect *all* public employee petitions from retaliation regardless of their purely private nature" (Pet. 11) (emphasis added). But *San Filippo* clearly does not exempt all such cases from the public concern requirement.

The petition at times edits quotations from Third Circuit decisions in ways that obscure their meaning. For example, the petition describes one passage in *San Filippo* in the following manner:

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[7] But not invariably. See Pet. 7.

> To disallow a retaliation claim because it addressed purely private concerns, the majority asserted, would make "the petition clause ... a trap for the unwary – and a dead letter."

(Pet. 4-5). This suggests that the Third Circuit comment was about all petitions, and that that Circuit thought (oddly) that failing to protect petitions on non-public concerns would somehow be uniquely unfair. In fact, however, the quoted twelve words from *San Filippo* are in a discussion about the "formal governmental adoption of a mechanism for redress of grievances." 30 F.3d at 442.

> If the government could ... freely discharge an employee for the reason that the employee ... invoked such a mechanism, the petition clause of the first amendment would, for public employees seeking to vindicate their employee interests, be a trap for the unwary a – and a dead letter.

Id. The "trap" described in the opinion consists of inviting workers to invoke some formal government-created mechanism, and then firing them for having done so.

Another passage in the petition asserts that

> the *San Filippo* majority distinguished petition claims from free speech claims. "When one files a 'petition,'" the majority argued, "one is not appealing over the government's head to the general citizenry: when one files a 'petition' one is addressing government and asking government to fix what, allegedly,

> government has broken or has failed in its duty to repair."

(Pet. 4) (quoting *San Filippo*, 30 F.3d at 442). This suggests that the Third Circuit held that *all* Petition Clause claims should be exempt from the *Connick* public concern rule. In fact, however, the term "petition" appears in quotation marks in this passage because the Third Circuit was referring only to petitions that invoke formal remedial mechanisms. The quoted passage is preceded by a sentence that draws precisely that distinction, using quotation marks around the word "petition" for that very purpose.

> [W]hen government ... formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

30 F.3d at 442.

The petition describes the Third Circuit decision in *Foraker* in the following manner:

> The Third Circuit contends that providing those who petition broader protection from retaliation than those who speak "is legitimate because the Petition Clause is not

> merely duplicative of the Free Speech clause." *Foraker*, 501 F.3d at 236.

(Pet. 12). But *Foraker* does not call for or defend providing broader protection to all "those who petition"; the fifteen words quoted from *Foraker* were offered only as a justification for broader treatment for public employees who file lawsuits or invoke other formal remedial mechanism.

> Formal petitions are defined by their invocation of a formal mechanism of redress.... [W]hen a formal petition is made, the employee need not show that the subject matter of the petition involved a matter of public concern. [*San Filippo*, 30 F.3d] at 442. This distinction is legitimate because the Petition Clause is not merely duplicative of the Free Speech Clause.

Foraker, 501 F.3d at 236.

(c) The petition repeatedly predicts that by according protection under the Petition Clause to lawsuits and other formal mechanisms not involving matters of public concern the Third Circuit will eviscerate the rule in *Connick*. "[T]he Third Circuit rule creates an easy end run around *Connick's* public concern requirement." (Pet. 24).[8] Under *San Filippo*,

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[8] "[The Third Circuit] rule would permit public employees to make an end run around the public concern requirement for free speech retaliation claims simply by couching their expression in the form of a petition." (Pet. 11).

petitioners contend, public employees can evade that requirement "simply by couching their expression in the form of a petition" (Pet. 11), or "through the commonplace step of filing a grievance" (Pet. 15).

> As other courts of appeals have recognized, permitting [retaliation claims that lack a matter of public concern] would open the federal floodgates to all manner of petty personal disputes." *Altman [v. Hurst*, 734 F.2d 1240,] 1244 [(7th Cir.1984)].

(Pet. 21) (bracketed material in petition).

The fatal problem with these dire predictions is that *San Filippo* was decided sixteen years ago. Petitioners do not contend that any of these predicted consequences have in fact occurred. Petitioners do not assert that there has been an avalanche of sham lawsuits or grievances used to concoct Petition Clause protections for otherwise unprotected statements. Indeed, the Third Circuit standard expressly does not apply to sham proceedings,[8] and petitioners do not contend that the courts in that circuit have identified any such problems. Petitioners do not, of course, contend that Guarnieri's 2003 grievance was merely a contrivance to obtain protection for statements criticizing the Borough Council; to the contrary, there is no dispute that the grievance and subsequent arbitration were a bona fide (and ultimately successful) effort to win back Guarnieri's job as Police Chief.

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[8] *San Filippo*, 30 F.3d at 436-37.

The petition identifies three appellate decisions in the sixteen years since *San Filippo* that have applied the standard in that case (including *Foraker*, which held the plaintiffs' actions in there were not protected by the Petition Clause). (Pet. 2). During the same period, however, appellate decisions in the Third Circuit applied the *Connick* public concern standard in 32 cases.[10] The petition identifies four district court decisions in the Third Circuit which have applied the standard in *San Filippo* during the years since that case was decided in 1994. (Pet. 26). During the same sixteen year period, however, district court decisions in the Third Circuit applied the *Connick* public concern standard in 158 cases.[11] Despite petitioners' predictions that *San Filippo* would largely supplant *Connick* as the controlling criterion in public employee First Amendment cases, nothing of the sort has occurred. To the contrary, *Connick's* public concern standard continues to govern the overwhelming majority of public employee First Amendment cases in the Third Circuit. The comparative handful of cases to which *San Filippo* has been applied are not important enough to warrant investment of this Court's scarce time and resources.

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[10] We set forth a list of those cases in an appendix to this brief.

[11] We set forth a list of those cases in an appendix to this brief.

That *San Filippo* has had only a marginal impact is not difficult to understand. Most of the gripes of public (or private) employees do not result in litigation because the underlying complaints simply do not involve any arguable violation of federal or state law. Petitioners hypothesize that state and local employees might file lawsuits solely for the purpose of voicing in an assertedly protected civil complaint some disagreement that they might have with their employers. But public employees generally lack the tens of thousand of dollars that would be needed to hire an attorney to litigate such a lawsuit, and no sensible lawyer would take such a case on a contingent fee basis. Similarly, most dissatisfactions on the part of employees would not support a colorable formal grievance and request for arbitration under a collective bargaining agreement (if any such agreement even existed), and ordinarily only a union – not an individual member – can press a grievance to the point of arbitration.

Petitioners assert that "the plaintiff in *Connick* could simply have filed her questionnaire in a grievance in order to have received First amendment protection." (Pet. 24). This comment illustrates precisely why *San Filippo* has had so little impact. Including that questionnaire in a grievance would have been utterly pointless. What the plaintiff in *Connick* wanted was for her fellow employees actually to read and fill out the questionnaire; there is no possibility that the plaintiff's co-workers would have gone to the arbitrator, obtained a copy of that questionnaire, and filled it out. And there is nothing in

Connick suggesting that the employer in that case even had some sort of formal grievance and arbitration mechanism that the plaintiff could have invoked.

(d) Even when it is applied, *San Filippo* often is not outcome determinative. In some instances courts holding that a plaintiff's statements were protected by the Petition Clause have noted that the statements, in any event, involved matters of public concern and would have been protected under *Connick*.[12] For example, petitioners point to *Marrero v. Camden County Bd. of Soc. Services*, 164 F.Supp.2d 455 (D.N.J.2001), as an example of a "run-of-the-mill employment dispute[ ]" that did not belong in federal court. (Pet. 26). *Marrero* concerned the dismissal of a county worker because she had filed an administrative complaint and lawsuit alleging sexual harassment and other gender based discrimination.[13] The district court noted that a complaint of sexual harassment constituted "speech on a 'matter of public

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[12] E.g., *Pollock v. City of Ocean City*, 968 F.Supp. 187, 192 (D.N.J.1997) ("*San Filippo* remains the law of this Circuit.... In any case, ... plaintiff's allegations – regarding personal favoritism, nepotism, and ultra vires acts on the part of City officials – probably suffice to implicate public concerns").

[13] 164 F.Supp.2d at 460-61. The petition refers to this case as merely involving "a tort claim notice involving alleged dress code violations." (Pet. 26). The dress code at issue was relevant only because it was part of the context in which the alleged gender-based discrimination and harassment occurred. The plaintiff alleged she was retaliated against for filing suit in federal court (which the Petition does not mention) and filing the tort claims notice; that notice was "a required precursor to her lawsuit." 164 F.Supp.2d at 468.

concern' that was protected by the First Amendment regardless of whether a formal petition was ever filed." 164 F.Supp.2d at 468 n.10.

Even where a plaintiff establishes that his or her conduct was indeed protected (only) by the Petition Clause, that often has no impact on the outcome of the litigation. Decisions recognizing that a plaintiff engaged in such protected activity routinely grant summary judgement to the defendant, either on the ground that there is insufficient evidence of an unconstitutional motive,[14] or because the defendants have immunity,[15] or because the asserted retaliation was too insignificant to be actionable.[16]

The core justification asserted by petitioners for denying constitutional protection to lawsuits and other formal proceedings regarding matters not of public concern is to accord state and local governments the latitude to punish or prohibit such actions if they are deemed inconsistent with the efficient operation of government. "The decision below ... critically undermines the ability of state and local

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[14] *Olsen v. Ammons*, 2009 WL 2426060 at *4 (M.D.Pa.); *Snavely v. Arnold*, 2009 WL 1743737 at *4 (M.D.Pa.); *Howard v. Bureau of Prisons*, 2008 WL 318387 at *16 (M.D.Pa.); *Walsifer v. Borough of Belmar*, 2006 WL 2990364 at *9-*11 (D.N.J.); *Barnes Foundation v. Township of Lower Merion*, 982 F.Supp. 970, 1002-03 (E.D.Pa.1997).

[15] *Deuvees v. Haste*, 620 F.Supp.2d 625, 636 (M.D.Pa.2009).

[16] *Snavely v. Arnold*, 2009 WL 1743737 at *4 (M.D.Pa.); *Howard v. Bureau of Prisons*, 2008 WL 318387 at *15 (M.D.Pa.).

governments to manage their work forces" (Pet. 3), and impairs "the ability of state and local governments to manage their employees efficiently." (Pet. 14; see *id.* at 10 (according protection under the Petition Clause would obstruct "necessary flexibility as employers"), 27 (according protection under the Petition Clause would impair "the efficient functioning of state and local governments")).

But precisely because *San Filippo* is limited to invocation of formal remedial mechanisms, the retaliatory practices at issue in these cases – far from being an ordinary tool of efficient management – are often forbidden by state or federal law in order to safeguard those very mechanisms, and thus are already unavailable to the state and local employers at issue. *Marrero v. Camden County Bd. of Soc. Services*, on which petitioners rely, involved retaliation against a county worker for filing an administrative complaint and lawsuit under the New Jersey Law Against Discrimination. 164 F.Supp.2d at 468-69. The terms of that very statute forbade the use of such reprisals. N.J.S.A. 10:5-12(d); see *Marrero*, 164 F.Supp.2d at 472-73. In *Moore v. Darlington Township*, 690 F.Supp.2d 378 (W.D.Pa.2010), also relied on by petitioners, the plaintiff had been fired because he sought and obtained an award under the state workers' compensation statute. Under Pennsylvania law such retaliatory dismissals, far from being an accepted method of reducing employer costs, were illegal. *Shick v. Shirey*, 552 Pa. 590, 716 A.2d 1231 (Pa.1998).

The instant case illustrates with particular clarity why *San Filippo* often has little if any impact on the ability of state and local officials to oversee their employees. Although petitioners insist that the Borough Council should have been permitted, without federal intervention, to implement the disputed directives (Pet. 26), those very directives had been largely invalidated by an arbitrator long before this case went to trial; the decision below did not limit "the Borough's right" to issue such directives, because the arbitrator had already effectively resolved the disputes about those directives. Petitioners do not refer to or defend the retaliatory denial of overtime that occurred in 2006. Again, however, the Borough clearly had no "right" to deny that overtime pay; the Department of Labor concluded that the Borough's actions had violated the Fair Labor Standards Act, a determination which the Borough does not contest.

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The particular circumstances of this case make it a poor vehicle for resolving the question presented.

First and foremost, Guarnieri was not a public employee at the point in time when he engaged in the assertedly protected activity. Guarnieri was fired on February 7, 2003, filed the grievance on February 20, 2003, participated in the arbitration hearings in August and September 2004, and was not rehired

until January 21, 2005. Petitioner asserts that the decision below "conflicts with decisions of this Court, which have held that when 'a public employee speaks ... as an employee upon matters only of personal interest," that speech is not protected by the free speech clause. (Pet. 2).[17] But when Guarnieri filed the grievance and pursued the arbitration that are at the heart of this case, he simply was not "a public employee speak[ing] ... as an employee." The decision in *Connick* deals with statements made by individuals while in the employ of a government entity. 461 U.S. at 146 ("employee expression"), 147 ("an employee's speech"; "[w]hen a public employee speaks"), 149 ("criticism by [public] employees"), 152 "the employee's speech").

Nothing in *Connick* purports to establish a standard for cases such as this in which an individual acted or spoke only as a private individual, and later suffered retaliation when he or she became a public employee. *Connick* makes clear that even speech about matters not of public concern ordinarily enjoys constitutional protection. 461 U.S. at 147. An individual may to some degree prospectively waive the right to exercise some of those rights as a condition of public employment, but assuredly individuals do not by taking a government job tacitly agree to being punished for speech or other actions that were

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[17] See Pet. 4 ("when a public employee speaks"), 19 ("public employee expression").

completely protected at the time it occurred. None of the opinions which petitioners claim conflict with the decision below involved the highly atypical circumstances of the instant case.

If certiorari were granted in this case, there is a substantial likelihood that Guarnieri would prevail on this ground alone. Were this Court to conclude that the public concern requirement of *Connick* does not apply to statements made by individuals at a point in time when they were not public employees, the decision below would be affirmed without ever reaching the question presented.

Second, in the particular circumstances of this case the asserted rationale for denying protection to petitions involving formal remedial mechanisms – the asserted importance of not interfering with retaliatory action as a method of assuring efficient governance – simply does not apply. The actions challenged in this case had already been invalidated on other grounds well before this case ever came to trial. Providing a remedy for the asserted Petition Clause violation in no way limited to the ability of the Borough to engage in the underlying practices, which it had long before been compelled to abandon by the actions of the arbitrator (in the second arbitration) and by the United States Department of Labor.

Finally, the second proven retaliatory act (the denial of overtime compensation) was taken as a reprisal for Guarnieri's filing of a section 1983 civil rights action in a federal district court. Petitioner

argues that according protection under the Petition Clause to actions not involving matters of public concern would be "inconsistent with sound principles of federalism and the separation of powers." (Pet. 22) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)). Whatever force that argument might have in ordinary contexts, it makes absolutely no sense when state or local officials seek to punish employees who have sought redress in a federal court for a violation of federal rights. To the contrary, sound principles of federalism weigh heavily against an interpretation of the Constitution which would permit – indeed, immunize – actions by state or local officials to obstruct or punish access to the federal courts. Similarly, the principles of separation of powers are assuredly trampled, not vindicated, when executive or legislative officials interfere with or retaliate against employees who in good faith seek redress from Article III courts.

III. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS IN *McDONALD* AND *CONNICK*

Petitioners correctly acknowledge that the question presented is an issue which this Court has not resolved.

> As the Third Circuit observed, this Court "has not discussed the scope of the constitutional right to petition in the context of an allegedly retaliatory discharge of a public employee." *San Filippo*, 30 F.3d at 435.

(Pet. 13). The petition never discusses, or even mentions, either the reasoning in *San Filippo* that the Petition Clause protects access to the courts, or the decisions of this Court – relied on in *San Filippo* – regarding that right of access.

The petition nonetheless asserts that the decision below (and in *San Filippo*) "flouts" the decisions of this Court. (Pet. 11). While there may be a colorable argument that the Petition Clause should be interpreted in the narrow fashion proposed by petitioners, that assuredly is not a question which this Court has already definitively determined.

(a) The petition asserts that "the Third Circuit's rule violates this Court's holding in *McDonald v. Smith* [, 472 U.S. 479 (1985)] that the Petition Clause protects expression no more than does the Free Speech Clause." (Pet. 14) (capitalization omitted); see Pet. 16 (*McDonald* "held ... that speech and petition should be treated alike"). This contention substantially overstates the holding in *McDonald*. The actual issue in *McDonald* was far narrower – whether the protections accorded to statements about matters of public concern by the Petition Clause, like the protections of the Free Speech Clause, are unavailable where a defendant sued for libel acted with knowledge that his statements were false or with reckless disregard of their veracity. 472 U.S. at 485. In holding that the Petition Clause and the Free Speech Clause are in this particular respect the same, *McDonald* relied on the specific history of libel claims. 472 U.S. at 483-84. That historical analysis is

obviously irrelevant in the instant case, which challenges, not the constitutionality of a libel action, but the constitutionality of a retaliatory dismissal.

Petitioner relies primarily on this Court's observation in *McDonald* that the purposes and historical origins of the Petition Clause and Free Speech Clause overlap. (Pet. 3, 14). But the Court's observation is far from a holding that the two clauses are identical. Clearly they are not. The Free Speech Clause protects many things – such as music, dance, speech unrelated to any possible action by the government – that would fall outside of the Petition Clause; there is no logical reason which the Petition Clause could not also apply to some actions not protected (or not protected to the same degree) by the Free Speech Clause. This Court has repeatedly held that the Petition Clause and Free Speech Clause are "not identical." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Most importantly, *McDonald* reiterated the very premise of the Third Circuit decision in *San Filippo*, holding that the "filing of a complaint in court is a form of petitioning activity," citing the same cases – *California Motor Transport* and *Bill Johnson's Restaurant* – relied on by *San Filippo* itself. Nothing in *McDonald* suggested that the right of access to the courts recognized in *California Motor Transport* and *Bill Johnson's Restaurant* is limited to lawsuits regarding matters of public concern.

The petition describes *McDonald* as holding that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." (Pet. 4-5, quoting *Mcdonald* 472 U.S. at 485). Edited in this way that passage from *McDonald* appears to announce a general rule that the protections accorded to petitions can be no broader than the protections accorded to speech. But the missing words in the ellipsis – "to the President" – gives the quoted passage a significantly narrower meaning. That passage states only that there was no reason to accord to that particular petition in *McDonald* itself greater protection under the Petition Clause than would be accorded to the same statement by the Free Speech Clause. Read without this key deletion, the passage in *Mcdonald* clearly does not reach all other situations to which the Petition Clause might apply, or hold (as petitioners contend) that the Petition Clause would never accord more protection to an individual filing a lawsuit than the Free Speech Clause would accord to that individual if, while a public employee, he made statements on the same subject to his supervisor or colleagues.

(b) Petitioners also argue that the issue in the instant case is controlled by this Court's decision in *Connick*. *Connick*, however, did not concern or even mention the Petition Clause.

The petition argues that

> The First Amendment Free Speech and Petition clauses ... share a singular purpose: "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick*, 461 U.S. at 145 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) ...).

(Pet. 17). But the actual quotation in *Connick* does not mention the Petition Clause; it refers, rather, that "the First Amendment." 461 U.S. at 145. In this context "the First Amendment" clearly referred to the Free Speech Clause. Obviously the listed purposes were not the reason for the adoption of every provision in the First Amendment; they were not, for example, the purposes for the adoption of Establishment Clause. The full quote from *Roth* (quoted in turn in *Connick*) states that the identified purpose is the reason for "the protection given speech and press," not the rationale for everyone of the provisions in the First Amendment. The sentence in *Connick* following the quoted passage refers specifically (and only) to "speech." 461 U.S. at 145.

Petitioners object that the filing of a lawsuit or a formal grievance by a government employee can be disruptive because it will "engag[e] the government in a time-consuming formal dispute." (Pet. 19). Petitioners also object that lawsuits can be expensive to defend. (Pet. 23). Certainly a city could save itself time and money if it forbade all its employees to sue the city (even in federal court), and if it could dismiss

any worker who did so. But this is a very different governmental interest than was relied on by the Court in *Connick*. Nothing in *Connick* suggested that government employers are entitled to use threats of reprisal to immunize themselves from lawsuits in federal court by plaintiffs seeking to enforce the Constitution and laws of the United States. And where, as here, a municipal government has made the considered judgment that its interests as an employer would best be served by adopting a collective bargaining agreement that includes a right to arbitration, nothing in *Connick* suggests it would be important to construe the First Amendment in a manner that would permit individual city officials to punish or obstruct employees who seek to résort to the very remedial mechanisms established by the city's own agreement.

CONCLUSION

For the above reasons certiorari should be denied.

Respectfully submitted,

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District Court Decisions In the Third Circuit Since *San Filippo* Applying the *Connick* Public Concern Standard

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BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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2 Bernard Schwartz, The Bill of Rights: A Documentary History (1971) 10

REPLY BRIEF FOR PETITIONERS

Respondent does not dispute (1) that a clear circuit conflict exists, (2) that the ten other federal courts of appeals and four state supreme courts to have ruled on the issue have all held in line with *Connick* v. *Myers*, 461 U.S. 138 (1983), that public employees may not sue their employers for retaliation under the Petition Clause when their petitions involve matters of purely private concern, (3) that the Third Circuit has repeatedly rejected requests to revisit its outlier position, and (4) that only this Court's intervention can establish uniformity on this important point of law. Nor does respondent deny that the Third Circuit rule exempts ordinary workplace grievances from *Connick*'s public concern requirement.

Instead, respondent makes three quite odd arguments. First, he urges that the Third Circuit's rule is "limited," *e.g.*, Br. in Opp. 9, or "narrow," *e.g.*, *id.* at 9, 10, because, in his view, although it applies to all employee lawsuits, grievances, and other formal complaints, *id.* at 8, 9-10, it does not extend to "emails," "verbal complaints," "internal memoranda," "letters," and "phone calls," *id.* at 11-12. Second and even more surprisingly, he argues that he should not be considered "a public employee at the point of time when he engaged in the assertedly protected activity," *id.* at 23, a period of over two years stretching from early 2003, when he first grieved his dismissal, until July 2005, when he filed his lawsuit—for all of which he either received pay from the Borough or was adjudged suspended by an

arbitrator. Third, he argues that there is no real tension between *Connick* and *McDonald* v. *Smith*, 472 U.S. 479 (1985), on the one hand, and the Third Circuit's rule, on the other, because the Petition Clause must be understood to "protect[] access to the courts." Br. in Opp. 27. Each contention seriously mistakes the law or the facts—or both.

In *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 439-443 (3d Cir. 1994), the Third Circuit held that *Connick*'s public concern limitation does not apply to "petitions" and indicated what actions so qualify. At one extreme, it held, "neither the United States nor the several states are required to recognize as a 'petition' whatever particular communication is so characterized by one who chooses to protest governmental acts or omissions." *Id.* at 442. At the other, "[l]awsuits, grievances, [and] workers compensation claims" clearly qualified. *Id.* at 439 n.18. To the Third Circuit, these latter activities all share one critical feature: they "invok[e] a formal mechanism for redress of grievances against the government." *Ibid.*[1]

What is critical, then, is not, as respondent contends, a complaint's level of formality and resemblance to a traditional lawsuit, but whether

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[1] Although the *San Filippo* opinion referenced "lawsuits," it never limited petitions to this one form. To the contrary, it expressly noted that it was using "the term 'lawsuit'" as shorthand for the broad range of conduct protected without reference to *Connick*'s "public concern" requirement, *i.e.*, "any device invoking a mechanism for redress of grievances against the government." *Ibid.*

the complaint "invoke[s] a mechanism for redress of grievances against the government." *San Filippo*, 30 F.3d at 439 n.18; *id.* at 442. Lawsuits can do that, of course, as can grievances and workers compensation complaints. It is also true that most office emails, letters, oral remarks, and phone calls do not. But sometimes they can, see *Bradshaw* v. *Twp. of Middletown*, 296 F. Supp. 2d 526, 546 (D.N.J. 2003) (holding that "public employee's announcement of an intention to file a lawsuit" constitutes a petition), and there are many ways in addition to filing a lawsuit, grievance, or workers compensation complaint to "invok[e] a mechanism for redress of grievances against the government," *San Filippo*, 30 F.3d at 439 n.18—including requesting mediation, filing an administrative complaint with an outside body, and asking for a hearing before a legislative or executive body. See, *e.g.*, *Morgan* v. *Covington Twp.*, No. 3:07-cv-1972, 2009 U.S. Dist. LEXIS 56003, at *29-32 (M.D. Pa. Mar. 6, 2009); *Ivan* v. *County of Middlesex*, 595 F. Supp. 2d 425, 469-470 (D.N.J. 2009); *Miller* v. *Weinstein*, Civil Action No. 06-224, 2008 U.S. Dist. LEXIS 111949, at *58 (W.D. Pa. Sept. 12, 2008).

Even if the Third Circuit's rule were strictly limited to lawsuits and grievances, as respondent suggests, it would still provide many opportunities for circumventing *Connick*'s public concern requirement: namely, every time a public employee files an employment grievance. Grievances are hardly uncommon or difficult to file. When a mere announcement that one plans to file a grievance constitutes formal petitioning, as it does in the Third

Circuit, cf. *Bradshaw*, 296 F. Supp. 2d at 546, the opportunities for leveraging an everyday workplace gripe into a constitutional case are legion. It is simply not true, as respondent asserts (ignoring, among other things, 42 U.S.C. § 1988), Br. in Opp. 19, that high costs and gatekeepers, such as lawyers and unions, will deter employees from petitioning.

It is true, of course, as respondent devotes more than one-third of his brief in opposition to detailing, Br. in Opp. 8, 17-18, 1a-16a (listing all Third Circuit cases and district court cases from within the Third Circuit applying *Connick*), that *Connick* continues to govern in many First Amendment retaliation claims even within the Third Circuit. This is unsurprising and reflects only the obvious fact that many everyday workplace complaints do not seek to "invok[e] a mechanism for redress of grievances against the government." *San Filippo*, 30 F.3d at 439 n.18.

Respondent is wrong, however, to insist that "*Connick*'s public concern standard continues to govern the *overwhelming majority* of public employee First Amendment cases in the Third Circuit." Br. in Opp. 18 (emphasis added). In fact, it has not done so in nearly half of recent cases. Although respondent's appendix identifies eight district court free speech cases decided in 2010 applying the *Connick* standard, Br. in Opp. App. 1a, six district court petition cases in that same span of time have applied *San Filippo* instead. *Emigh* v. *Miller*, Civil Action No. 08-1726, 2010 U.S. Dist. LEXIS 74414, at *46-50 (W.D. Pa. July 23, 2010),

Pa. State Troopers Ass'n v. *Paulowski*, Civil Action No. 1:CV-09-1748, 2010 U.S. Dist. LEXIS 59544, at *16-17 (M.D. Pa. June 16, 2010); *Baltimore* v. *Harrisburg Parking Auth.*, Civil Action No. 1:07-cv-01244, 2010 U.S. Dist. LEXIS 59508, at *25 (M.D. Pa. June 15, 2010); *Davis-Heep* v. *City of Philadelphia*, Civil Action No. 09-5619, 2010 U.S. Dist. LEXIS 39023, at *12-15 (E.D. Pa. Apr. 19, 2010); *Whitfield* v. *Chartiers Valley Sch. Dist.*, 2:09cv1084, 2010 U.S. Dist. LEXIS 37545, at *79-83 (W.D. Pa. Apr. 15, 2010); *Salisbury* v. *City of Pittsburgh*, Civil Action No. 08-cv-0125, 2010 U.S. Dist. LEXIS 15773, at *30-31 (W.D. Pa. Feb. 23, 2010). In the current calendar year, district courts within the Third Circuit have applied and not applied the *Connick* standard to public employment retaliation cases almost equally.

Nor is it surprising that "*San Filippo* often is not outcome determinative." Br. in Opp. 20. In fact, few legal doctrines, including *Connick*'s public concern requirement itself, usually are. What is surprising is that respondent believes this fact relevant. A doctrine need not be outcome-determinative to matter and any doctrine—no matter how important—fails to be uniformly outcome-determinative when plaintiffs must establish any other element to make their legal claim.

Respondent also contends that even if the issue in this case is cert-worthy it comes in an inappropriate vehicle. In particular, he claims he should not be considered "a public employee speak[ing] . . . as an employee," Br. in Opp. 24, at the time he filed his

initial grievance and because, although he admittedly filed his lawsuit when he was a public employee, the lawsuit implicates none of the "sound principles of federalism and the separation of powers," *id.* at 26 (quoting *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006)), that this Court found relevant in *Garcetti*. The first claim, however, is misleading, while the second tries to obfuscate what it cannot fail to admit.

Respondent was fired on February 7, 2003, filed his grievance on February 20, 2003, participated in arbitration after that, and on December 28, 2004, learned that the arbitration had resulted in his reinstatement, an award of back pay from February 7, 2004, and a disciplinary suspension from February 7, 2003 until February 6, 2004. C.A. App. A00885. At the time respondent filed his grievance, in other words, the arbitrator held him to be an employee—albeit one petitioners had a valid reason to suspend. That decision bound both petitioners and respondent. If petitioners had failed to treat respondent as an employee for that period they would have been in violation of the arbitration decision. In similar cases, moreover, courts have recognized dismissed-but-later-reinstated public employees who sue their employers for retaliating against them for their having sought the arbitration that overturned their dismissal to have been "employees" at the time they sought reinstatement through arbitration. *See Zugarek* v. *S. Tioga Sch. Dist.*, 214 F. Supp. 2d 468, 475-476 (M.D. Pa. 2002); *cf. Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346

(1997) (former employee considered "employee" under Title VII's antiretaliation provision).

Respondent filed his lawsuit in July 2005. He amended it on December 21, 2006 to allege that the Borough had denied him overtime in retaliation for his having filed the suit itself. Am. Compl. ¶¶ 39-42. He cannot – and does not – claim he was in any sense not an "employee" when he filed the lawsuit. Instead, he argues summarily and unconvincingly that the "sound principles of federalism and separation of powers" this Court discussed in *Garcetti* have no application when a public employee seeks "redress in a federal court for a violation of federal rights." Br. in Opp. 26. Even if that were true, which it is not, *Connick* identified many *other* policies that require public employee petitions and speech be treated equally.

In fact, respondent's only real argument that this case is an inappropriate vehicle – that, although he availed himself of a mechanism only an employee could use and sought and obtained an arbitration order that he should be considered an employee suspended for disciplinary reasons on the relevant date, he was not actually an "employee"—can only make the case a better one. If the question of when an individual should be considered an "employee" for First Amendment purposes actually interests this Court, this case presents it *in addition to* the issue of whether *Connick*'s public concern requirement applies to petitions. Because respondent filed his lawsuit when he admits he was fully a public employee, there is no danger of this Court not

reaching the *Connick* issue with respect to this claim.

From his reformulation of the Question Presented, Br. in Opp. i ("Does the right of access of the courts"), to his insistence that the Third Circuit's rule is "narrow," Br. in Opp. 9-10 ("Because the Third Circuit rule derives from the right of access to the courts"), to his argument that the Third Circuit's rule does not conflict with *McDonald* and *Connick*, Br. in Opp. 27-28 ("Nothing in *McDonald* suggested that the right of access to the courts * * * is limited to lawsuits regarding matters of public concern."), respondent strives heroically to recharacterize the case as involving more the "right of access to the courts" than the Petition Clause itself. This recharacterization represents the central theme of his argument but it is ultimately unsuccessful on its own terms. It mistakes applicable law, misunderstands the Petition Clause, and, most surprisingly, would, even if it were correct, fail to justify applying the Third Circuit rule to much of respondent's own case.

Respondent develops his novel interpretation of the Petition Clause as centrally protecting access to the courts from a misreading of *San Filippo*. He argues that two cases discussed in *San Filippo*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), demonstrate that the right of access to the courts underlies, justifies, and determines the scope of *San Filippo*'s rule. See Br. in Opp. 9-10; see also *id.* at

28. *San Filippo* cannot, however, bear the weight respondent would place on it. Although the opinion did discuss these two cases, it did so not to conclude that the Petition Clause protects at its very core the right of access to the courts but only to acknowledge this Court's holdings that so-called "sham" petitioning receives no Petition Clause protection. See *San Filippo*, 30 F.3d 424, 436 (1994) ("In *California Motor Transport Co. v. Trucking Unlimited*, the Court developed the 'mere sham' exception to petition clause protection.") (citation omitted); *ibid.* ("The unprotected status of 'sham litigation' was again recognized in *Bill Johnson's Restaurants Inc. v. NLRB*, in which the Court announced that baseless litigation is not immunized by the First Amendment right to petition.") (citation omitted). The *San Filippo* court thus excluded sham petitions from its otherwise capacious Petition Clause protection. See *id.* at 443 ("On remand, the district court should consider which, if any, of San Filippo's grievances and lawsuits constituted a 'petition,' and whether any such 'petition' was non-sham. The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.") Litigation in court does receive some protection under the Petition Clause but, as the *San Filippo* court acknowledged (quoting this Court's decision in *California Motor Transport*), "[t]he right of access to the courts is * * * *but one* aspect of the right of petition." *Id.* at 436 (quoting 404 U.S. at 510) (emphasis added).

But rights of court access do not, as respondent posits, define the core of the Petition Clause or

warrant special rules for lawsuits. Access to the legislature, not to the courts, was the central object of the Petition Clause's protection. Thus, James Madison explained when he introduced what became the First Amendment that "[it is] proper to be recommended by Congress to the State Legislatures [that t]he people shall not be restrained * * * from applying *to the Legislature* by petitions, or remonstrances, for redress of their grievances." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (emphasis added); see generally Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 156 (1986) ("The express function of the * * * petition clause was to protect citizens applying to the Legislature.") (internal quotation marks omitted).

Respondent appears to recognize that even his ahistorical vision of the Petition Clause cannot quite do the work he needs of it. He thus repeatedly supersizes his access-to-the-courts version of the Petition Clause to cover everyday workplace grievances and arbitrations, which, of course, occur entirely outside the courts. See, e.g., Br. in Opp. 9-10 ("Because the Third Circuit rule derives from the right of access to the courts, it is expressly limited to invocation of some 'formal mechanism for redress of grievances,' such as a lawsuit or a formal grievance and arbitration process under a collective bargaining agreement.") (citation omitted). Why he does so is clear. Without putting grievances and arbitrations at the heart of the clause, he cannot justify even his "narrow" version of *San Filippo* or the Third

Circuit's application of its rule to his own case, which concerns not just a lawsuit but grievances. But putting them there undermines his overarching claim that *Connick* should not apply to petitions because the Petition Clause offers special protection to lawsuits. Respondent cannot have it both ways. This case concerns the Petition Clause, not a more particularized right of access to the courts.

Respondent, thus, cannot complain that the Borough misunderstands *McDonald* and *Connick* because "the petition never discusses, or even mentions, either the reasoning in *San Filippo* that the Petition Clause protects access to the courts, or the decisions of this Court—relied on in *San Filippo*—regarding that right of access." Br. in Opp. 27. That right is largely irrelevant here. If *Connick*'s public concern requirement does not apply to respondent's grievances, it cannot be because the right of access to the courts protects them. Grievances are decided elsewhere. Even respondent's version of the Petition Clause, then, cannot stretch as far as he needs.

It would behoove respondent to offer some reason why the important policies embodied in *Connick* should not apply to petitions. Yet he does not. All he does in the page and a half that comprises the relevant section of his brief, Br. in Opp. 29-31, is first point out the obvious—that *Connick* involved the Free Speech rather than the Petition Clause, Br. in Opp. 30—and then seriously mischaracterize the Borough's argument. We do not argue that states and localities should be able to "forb[id] all [their]

employees to sue [them] * * * and * * * dismiss any worker who d[oes] so," Br. in Opp. 30-31, any more than the employer in *Connick* argued that states and localities could forbid all their employees from saying bad things about them and dismiss any who did so. Rather, we argue simply that the public employment policies that this Court has found exceedingly important in related free speech cases should have equal purchase in petition cases. The particular type of action an employee takes to complain—speech or petition—makes no difference as to any of the policies the *Connick* rule exists to vindicate.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument or, in the alternative, the petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers for retaliation under the Petition Clause unless their petitions involved matters of public concern.

Respectfully submitted.

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In The

Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,

Petitioners,

v.

CHARLES J. GUARNIERI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue.

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INTEREST OF *AMICUS CURIAE*[1]

The Pennsylvania State Association of Boroughs is a non-profit incorporated association advocating the interests of more than 950 rural and urban boroughs and approximately 16,000 elected and appointed borough officials. The Association represents the boroughs at both the state and federal levels to present a unified voice on public matters of concern. The Association provides research, education and service programs to assist borough officials in fulfilling their elected duties and responsibilities. The Association is specifically charged by The Borough Code, 53 P.S. §45701, with the purpose and responsibility of advancing the interests of boroughs and improving local government.

According to the Pennsylvania Department of Community and Economic Development, boroughs are one of the most common forms of local governments in Pennsylvania. Pennsylvania boroughs have a total population of approximately 2,570,885 individuals and an average population of 2,684 per borough. The 958 boroughs of the Commonwealth represent

[1] Notice of intention to file this *amicus* brief has been provided to, received and accepted by the parties and they have consented to its filing. Consents are being submitted with this brief. Pursuant to S.Ct. R. 36.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

approximately thirty-seven percent (37%) of all municipal governments in Pennsylvania averaging approximately fourteen (14) per county. Pennsylvania is divided into a total of sixty-seven (67) counties with each borough independently governed apart from the counties.

The size of Pennsylvania boroughs varies greatly throughout the Commonwealth. Some of the largest boroughs by population (per 2000 Census) are State College (38,420 – Centre County), Bethel Park (33,556 – Allegheny County), Norristown (31,282 – Montgomery County), Monroeville (29,349 – Allegheny County), Plum (26,940 – Allegheny County), West Mifflin (22,464 – Allegheny County) and Pottstown (21,859 – Montgomery County). Some of the smallest boroughs by population in the Commonwealth are New Morgan (35 – Berks County), Valley-High (20 – Fulton County), Green Hills (18 – Washington County), Smicksburg (49 – Indiana County), Callimont (51 – Somerset County) and Glasgow (63 – Beaver County).

Boroughs are and have been a viable and vibrant form of self-government which is a part of the diverse history of the Commonwealth of Pennsylvania. The Association has an interest in this case as its adjudication shall have a substantial direct statewide impact upon a fundamental system of governing within the Commonwealth, the growth and development of boroughs in the Commonwealth and their continuing financial viability as an employer of a

work force to provide services to borough residents and taxpayers.

STATEMENT

Amicus incorporates by reference the Statement of the case set forth in the Petition For Writ of Certiorari of Petitioners Borough of Duryea, Pennsylvania, *et al.*

SUMMARY OF ARGUMENT

The Third Circuit has repeatedly rendered affirmed a right for a government employee to sue their employers for retaliation under the Petition Clause of the First Amendment, U.S. Const. Amend. I, cl. 6 on matters of solely private concern. The Third Circuit's position is at odds with the decisions of this Court and the ten other federal circuits that have consistently held that such individual public employee claims are not cognizable under the Petition Clause.

A divergence occurred in the use of petition during its history between medieval England and the English colonies upon the formation of a new nation in America. The historical origin of petition in England encompassed its use for both public and private grievances. Colonial Americans expressed their collective grievances in order to gain independence. The

concept of one voice of the populace prevailed in the use of petition which was intentionally given a comparable status to rights of speech, religion, press and assembly, to be protected in the First Amendment to preserve that independence.

The petition was a consistent tool of public dialog and means for citizens to continue to focus the attention of the new and developing government on policies and issues of public concern. The First Amendment protects the right of the People, for and by whom the Constitution was founded, to petition their Government for the redress of their grievances.

The Third Circuit acknowledges the fundamental importance of effective and efficient government. Its decision in this case belies that principle. Despite its history, the Third Circuit elevated the Petition Clause, despite its history, to provide constitutional protection to public employees who articulate individual claims, objections or grievances in writing, where such constitutional protection is not available to private sector employees.

Boroughs are a form of local government in the Commonwealth of Pennsylvania that must compete in and with private sector employers to provide wages and benefits to employees to provide services to residents and taxpayers. Boroughs and other municipalities are at a distinct disadvantage because of the Third Circuit's decision in this case, and are subject to defending a myriad of individual employee claims in the federal courts that private employers will not

need to defend. As a result of constitutionalizing public employer-employee disputes, small borough governments, which have limited revenue resources and budgets, will be easily overburdened merely by the threat of employee litigation.

The result to borough's and local government is a real threat to maintaining effective and efficient management of government operations. The dedication of volunteer public elected service will evaporate as more elected officials are besieged with individual labor issues because of the elevated protection afforded by the Petition Clause.

The right of Petition was never intended to be given any "special first amendment status." *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985). Using the Petition Clause to prosecute private individual disputes will engender greater divisiveness than employee speech itself. It is time for the principle that all citizens' fundamental rights are protected expressed in *Connick v. Myers*, 461 U.S. 138 (1983) be implemented by holding public employees to the same standard of public concern as private sector employees in the Third Circuit.

ARGUMENT

The Third Circuit stands alone holding that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition

Clause from retaliation for that activity, *even if the petition concerns a matter of solely private concern.*" *Guarnieri v. Durvea Borough*, Slip Copy, 2010 WL 381398, *2 (C.A. 3, Feb. 4, 2010) (emphasis added). This holding is at odds with the underlying principle that all citizens' fundamental rights are protected. This principle is clearly expressed in *Connick v. Myers*, where this Court stated, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; *this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.*" 461 U.S. 138, 147, 103 S.Ct. 1684, 1690 (1983) (emphasis added).

The Third Circuit has elevated the Petition Clause, giving it greater deference and greater protection than the other rights protected by the First Amendment. The Third Circuit attempted to justify its position by tracing the historical roots of the Petition Clause to the Magna Carta in 1215. The right that was granted under the Magna Carta, and the right that developed in medieval England saw the petition used to redress both public and private ills. As medieval society evolved into modern society, and as the English colonies became the United States of America, the rights of the people (and the rights protected by the Petition Clause) have also evolved, taking a different path than was followed in England.

The use of the petition to redress individual, private grievances never gained a strong foothold in

America. The Third Circuit lost sight of this critical divergence. Prior to gaining our independence from England, the petition was the only safe means by which the Colonists could complain about and criticize the policies and practices of the King.[1] Petitioning was also one of the principle means for Colonists to formalize popular positions that eventually became law. The right to petition was used by the Colonists to present grievances to the King; for the Colonial Americans the right to petition was the means by which citizens expressed grievances or championed change to government. While the protections and rights offered by the Petition Clause have survived through the First Amendment, these protections and rights have also necessarily evolved. One American concept has remained true – the petition has principally been the one voice upon which the *populace* has relied to express itself to the governing entity.

At the time of the Revolution political petitions were the only authorized way for individuals to voice complaints and concerns to the government. The Founding Fathers recognized the need to preserve petition rights after the Revolution. They did so, however, not by elevating the petition above or separating it from the other First Amendment rights, but by including the right to petition government

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[1] The Stamp Act and the Molasses Act are two of the laws against which pre-Revolution Colonial *Assemblies* petitioned.

together with the rights of speech, religion, press and assembly. Importantly, the rights of Petition and Assembly were initially considered as their own amendment, separate from religion, speech and press. This initial concept was discarded in the final version of the Bill of Rights; freedoms of speech, religion, press, assembly and petition were combined in the First Amendment with no pretext of superiority of any one right over another.[5]

The First Amendment was borne out of a time in history when oppressive restrictions on seditious speech existed to quash public expression by critics of the Crown. Consolidating the protection of speech on matters of public concern with the right to petition is telling and persuasive of the parity that needs to be achieved today by reversing the position taken by the Third Circuit.

Historically, the petition right in early America was used by groups and individuals to address subject matters that were both political and purely private in nature. As our country grew and matured, and as our single government evolved into many local forms of government, the petition continued to evolve. The petition was once a form of public dialog before

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[5] For a detailed history of the Petition Clause see: Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 Hastings Const. L.Q. 15 (1993); Norman B. Smith, "*Shall Make No Law Abridging . . .*": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153 (1986).

the media and national political parties took on that mantle, it is now a tool that allows citizens to focus governmental attention on malfeasance, unresolved problems, unpopular policies and popular frustrations without endangering public welfare or order. The petition is the tool that guarantees the public leaders hear the electorate, even if they fail to listen.

The First Amendment of the United States Constitution protects the right of the *people* to petition the Government for a redress of grievances. But when the government is acting as an employer, its interest in achieving its goals as efficiently and effectively as possible is significant. *San Filippo v. Bongiovanni*, 30 F.3d 424, 441 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Although the Third Circuit identified the importance of effective and efficient government, it abruptly departed from the course set by the other Circuits when it granted constitutional protection to governmental employees who articulate their objection, criticism or grievance in writing – a level of protection that is not available to the private sector employee.

This Court should not permit matters of an individual basis – such as disputes between a supervisor and a subordinate in the workplace – to attain constitutional protection simply because the employer is the government. Even though *Connick* did not address the Petition Clause, this Court's mandate is paramount: citizens working for government should not be deprived of their fundamental rights, nor should they receive an immunity for exercising those rights that is not available to the private worker.

The case at bar presents this Court with the opportunity to clarify that in-house grievance procedures should not be granted constitutional protection through the Petition Clause unless such grievance transcends individual complaints and implicates matters of public concern.

Boroughs and other types of municipalities are custodians of the public trust and property, and are charged with providing for the health, safety and welfare of their residents and taxpayers. A premium must be placed upon a goal of efficient and effective operation due to practical financial constraints of the taxing authority. Government as an employer competes with the private sector. It must fulfill its responsibilities, yet provide competitive benefits and wages in order to obtain and retain qualified personnel.

Local government must be able to hire, discipline, discharge and supervise employee conduct. Boroughs do not operate in a vacuum and are subject, *inter alia* to the requirements of labor agreements, which provide negotiated mechanisms to redress employee grievances; state and federal labor laws; Title VII; equal employment opportunity requirements; and the protections from discrimination against protected classes.

Boroughs within the Third Circuit are substantially disadvantaged; they are subject to litigation and the threat of litigation under the Petition Clause that does not exist in the remaining Circuit

Courts. The employer-employee relationship is a constant whether in the public or private sectors. A public employer is still just an employer (without the typical reward of profit), providing wages and benefits in exchange for services. Employees of public employers should not receive greater protections from retaliation, and employees of private employers should not receive fewer protections from retaliation by the employer. Workplace disputes, generally, are not given constitutional protection in the private sector; similarly, workplace disputes should not rise to a constitutional question in the public sector.

Constitutionalizing the personal grievances of employees under the Petition Clause will subject boroughs and other governments to a myriad of federal claims for individual interests solely because the employee formalized and expressed their complaint under the guise of a grievance, arbitration claim or lawsuit. Giving a purely private claim constitutional weight will impair and undermine the local government's ability to render even basic management decisions due to the mere threat of employee claims being brought before the courts. The courts will be faced with the responsibility of overseeing day-to-day managerial decisions affecting policy as well as daily effective and efficient governmental operations.

Smaller governments such as boroughs have limited resources and income. By constitutionalizing individual claims, the threat of the money and time

consumed defending such claims, which foster *in terrorem* settlements, is magnified.

According to the Pennsylvania Governor's Center for Local Government Services, Department of Community and Economic Development, Pennsylvania Local Government Fact Sheet, as of October 2009, 958 boroughs comprise 37% of the 2562 total number of all Pennsylvania municipalities. With a total population of 12,281,054 in Pennsylvania, 78% of all municipalities have a population under 5,000. A total of 159,483 individuals are employed in municipalities of which 19,496 are located in boroughs. Approximately one-third (⅓) of Pennsylvania boroughs as of 2009 have annual budgets of less than $500,000 and at least forty-seven percent (47%) of boroughs have budgets of less than $1,000,000; and, of these: at least ninety (90) borough budgets are less than $100,000; at least 117 have budgets of $100,000 to $250,000; at least 106 have budgets of $250,000 to $500,000; and at least 135 have budgets of $500,000 to $1,000,000.

The threat to efficient and effective management of government operations is real. Elected officials besieged by labor issues subject to federal court actions under the elevated protections of the Petition Clause will also be subjected to the electorate's criticism. A chilling effect on the dedication of elected officials to volunteer for public service will likely ensue. A determined individual or a small number of employees could substantially derail government operations and misdirect public resources to pursue

personal interests, all to the detriment of the public that local government is charged to protect.

The right of petition is "cut from the same cloth" as other guarantees of the First Amendment and was indeed never intended to be elevated to "special first amendment status". *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985). Using the Petition Clause for access to the courts attracts as much or more divisive attention than employee speech. *San Filippo v. Bongiovanni*, 30 F.3d 424, 450 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (Becker J., concurring in part and dissenting in part). More attention occurs due to downward pressure on taxes, revenue sources, increased time and attention of elected officials to such claims, all rendering government less efficient and effective. Therefore, the public concern espoused in *Connick* should apply to be on par with employee speech. This case provides the time to define the role of the Petition Clause with respect to public employers.

CONCLUSION

Amicus concurs with Petitioner's statement of arguments and authorities cited as well as relief requested as set forth in the Petition for Writ of Certiorari which are incorporated herein.

Respectfully submitted,

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July 6, 2010

SUPREME COURT, U.S.
FILED
DEC - 6 2010
OFFICE OF THE CLERK

No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed June 2, 2010
Certiorari Granted October 12, 2010

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Petition for Writ of Certiorari
Filed June 2, 2010
Certiorari Granted October 12, 2010

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3949

Charles Guarnieri, Jr., Plaintiff-Appellee,

v.

Duryea Borough, *et al.*, Defendants-Appellants.

Appeal from Middle District of Pennsylvania

Date	Docket Entry
09/29/2008	CIVIL CASE DOCKETED. * * *
01/26/2009	ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellants. * * *
01/26/2009	ELECTRONIC JOINT APPENDIX on behalf of Appellants. * * *
01/28/2009	HARD COPY RECEIVED from Appellants [of] Brief with Volume I of Appendix attached. * * *
01/28/2009	HARD COPY RECEIVED from Appellants [of] Brief with Volume I of Appendix attached. * * *
02/25/2009	ELECTRONIC BRIEF on behalf of Appellee/Cross-Appellant Charles J. Guarnieri, Jr. * * *
02/26/2009	HARD COPY RECEIVED from Ap-

	pellee/Cross-Appellant Charles J. Guarnieri, Jr. [of] Brief. * * *
03/27/2009	ECF FILER: ELECTRONIC BRIEF on behalf of Appellants. * * *
03/30/2009	HARD COPY RECEIVED from Appellants [of] Reply Brief. * * *
	* * *
04/27/2009	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee Charles J. Guarnieri, Jr. * * *
04/28/2009	HARD COPY RECEIVED from Appellee Charles J. Guarnieri, Jr. [of] Reply Brief. * * *
	* * *
10/27/2009	ARGUED on Tuesday, October 27, 2009 before SLOVITER, FUENTES and HARDIMAN, Circuit Judges. * * *
02/04/2010	NOT PRECEDENTIAL OPINION Coram: SLOVITER, FUENTES and HARDIMAN, Circuit Judges. Total Pages: 13. Judge: SLOVITER Authoring Judge. * * *
02/04/2010	JUDGMENT, Affirmed in Part and Reversed in Part. Costs taxed against Appellants. * * *
02/05/2010	ECF FILER: BILL OF COSTS filed on behalf of Appellee Charles J. Guarnieri, Jr. * * *
02/18/2010	ECF FILER: Petition filed by Appellants. * * * for Rehearing before the original panel and

	the court en banc. * * *
03/04/2010	ORDER (SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges) denying [petition] for Panel Rehearing and for Rehearing En Banc filed by Appellants/Cross-Appel-lees. * * * Dolores K. Sloviter, Authoring Judge. * * *
03/12/2010	MANDATE ISSUED. * * *
06/07/2010	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Duryea Bor on 06/02/2010. Supreme Court Case No. 09-1476. * * *
10/12/2010	NOTICE of U.S. Supreme Court. Disposition at [sic] No. 09-1476. Petition for Writ of Ceriorari filed by Borough of Duryea granted on 10/12/2010. * * *

UNITED STATES DISTRICT COUR
MIDDLE DISTRICT OF PENNSYLVANIA
(SCRANTON)

No. 3:05-cv-01422-ARC

Charles J. Guarnieri, Jr., Plaintiff,

v.

Duryea Borough, *et. al.*, Defendants.

Date Filed	#	Docket Text
		* * *
07/18/2005	1	COMPLAINT * * * filed by Charles J. Guarnieri, Jr. * * *
		* * *
08/29/2005	8	ANSWER to Complaint with Jury Demand by All Defendants. * * *
		* * *
12/21/2006	38	AMENDED COMPLAINT against all defendants filed by Charles J. Guarnieri, Jr. * * *
12/22/2006	39	MOTION for Summary Judgment by All Defendants. * * *
12/22/2006	40	STATEMENT OF FACTS *in support of Their Motion for*

		Summary Judgment filed by All Defendants. * * *
12/22/2006	41	BRIEF IN SUPPORT re 39 MOTION for Summary Judgment filed by All Defendants. * * *
	* * *	
12/29/2006	43	*Answer of Defendants to Amended Complaint* ANSWER to Complaint by All Defendants. * * *
	* * *	
01/15/2007	45	BRIEF IN OPPOSITION re 39 MOTION for Summary Judgment filed by Charles J. Guarnieri, Jr. * * *
01/15/2007	46	STATEMENT OF FACTS re 40 Statement of Facts, *In Dispute* filed by Charles J. Guarnieri, Jr. * * *
	* * *	
11/15/2007	51	MEMORANDUM AND ORDER granting in part and denying in part 39 Defendants' Motion for Summary Judgment as follows: Defendants' motion will be granted with respect to the Fourth Amendment claims, the Fourteenth Amendment claims for pre-deprivation and post-deprivation pro- cess in

		Count I, and the First Amendment claim for violation of the right to free speech in Count II. Defendants' motion will be denied with respect to the First Amendment claim for violation of the right to freedom of petition in Count II and the First Amendment claim for violation of the right to free association in Count III. Plaintiff's claim for violation of the right to freedom of petition pursuant to the First Amendment in Count IV will remain, as Defendant failed to move for its dismissal in their motion. Signed by Judge A. Richard Caputo on 11/15/07. * * *
* * *		
03/26/2008	61	PRETRIAL MEMORANDUM by Charles J. Guarnieri, Jr. * * *
* * *		
03/27/2008	63	PRETRIAL MEMORANDUM by All Defendants. * * *
* * *		
04/18/2008	102	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri,

		Jr., and against Defendant, Duryea Borough, in the amount of $5.350.00. * * *
04/18/2008	103	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Ann Dommes, in the amount of $11.501.00. * * *
04/18/2008	104	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Lois Morreale, in the amount of $11.501.00. * * *
04/18/2008	105	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Frank Groblewski, in the amount of $11.501.00. * * *
04/18/2008	106	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Edward Orkwis, in the amount of $11.501.00. * * *
04/18/2008	107	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Robert Webb, in the amount of $11.501.00. * * *

04/18/2008	108	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Audrey Yager, in the amount of $11.501.00. * * *
04/18/2008	109	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Joan Orloski, in the amount of $11.501.00. * * *
04/18/2008	110	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Alfred Akulonis, in the amount of $11.501.00. * * *
* * *		
04/25/2008	121	MOTION for Judgment as a Matter of Law *Post Trial Motions*, MOTION for New Trial by All Defendants. . * * *
04/28/2008	122	MOTION for Attorney Fees by Charles J. Guarnieri, Jr. * * *
04/28/2008	123	BRIEF IN SUPPORT re 122 MOTION for Attorney Fees filed by Charles J. Guarnieri, Jr. * * *
* * *		
06/16/2008	139	BRIEF IN OPPOSITION re 121

		MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by all Defendants. * * *
* * *		
07/17/2008	145	BRIEF IN OPPOSITION re 121 MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by Charles J. Guarnieri, Jr. * * *
07/31/2008	146	REPLY BRIEF re 121 MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by All Defendants. * * *
08/04/2008	147	Supplement by All Defendants to 122 MOTION for Attorney Fees, 133 brief in Opposition. * * *
09/02/2008	148	MEMORANDUM AND ORDER, Motions terminated: 121 MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by All Defendants, 127 Motion to Stay Proceedings to Enforce Judgment filed by All Defendants. IT IS HEREBY ORDERED that: (1) Defen-

		dants' renewed motion for judgment as a matter of law pursuant to Rule 50 and motion for a new trial (Doc. 121) pursuant to Rule 59 are DENIED. (2) Defendants' motion to stay the enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(b) (Doc. 127) is DENIED as moot. Signed by Honorable A. Richard Caputo on 9/2/08. * * *
	* * *	
09/18/2008	150	NOTICE OF APPEAL in NON-PRISONER Case as to 104 Clerk's Judgment, 103 Clerk's Judgment, 102 Clerk's Judgment, 105 Clerk's Judgment, 108 Clerk's Judgment, 109 Clerk's Judgment, 106 Clerk's Judgment, 110 Clerk's Judgment, 107 Clerk's Judgment, 148 Memorandum & Order, Terminate Motion, by All Defendants. Filing Fee and Docket Fee PAID. * * * The Clerk's Office hereby certifies the record and the docket sheet avail-

		able through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. * * *
* * *		
09/29/2008	152	USCA Case Number 08-3949 for 150 Notice of Appeal, filed by All Defendants. * * *
10/09/2008	153	MEMORANDUM AND ORDER: IT IS HEREBY ORDERED that Plaintiff's motion for attorneys' fees and costs (Doc. 122) is GRANTED IN PART and DENIED IN PART as follows: (1) Attorney's fees for Ms. Cynthia Pollick are awarded in the amount of forty-five thousand dollars ($45,000.00); (2) Costs are awarded in the amount of four thousand five hundred forty-one dollars and ninety-nine cents ($4,541.99). * * *
10/30/2008	154	NOTICE OF APPEAL in NON-PRISONER Case as to 153 Memorandum & Order, Terminate Motions, by Charles J. Guarnieri, Jr. Filing Fee and Docket Fee Paid. * * * The Clerk's Of-

		fice hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. * * *
11/12/2008	155	USCA Case Number 08-4428 for 154 Notice of Appeal, filed by Charles J. Guarnieri, Jr. * * *
* * *		
03/12/2010	171	MANDATE of USCA as to 150 Notice of Appeal, filed by All Defendants, 154 Notice of Appeal, filed by Charles J. Guarnieri, Jr. * * *

Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

In the Matter of Arbitration between	
BOROUGH OF DURYEA	AAA Case No. 14 390 00720 03
- and-	Grievance of Charles J Guarnieri, Jr.
THE DURYEA BOROUGH POLICE DEPARTMENT	

The arbitration hearings in this matter were held in Duryea, Pennsylvania on August 16 and September 9, 2004. Representing Borough of Duryea (hereinafter "the Borough") was Joseph C. Rudolf, Esq. Representing The Duryea Borough Police Department (hereinafter "the Police") was Sean T. Welby, Esq. The following witnesses were sworn and testified at the hearing:

Lois Morreale, Borough Secretary.
Edward Orkwis, Borough Council Member.
Robert Webb, Borough Council Member.
Keith A. Moss, Mayor.
Ann R. Dommes, Borough Council Chair.
Charles J. Guarnieri, Jr., Grievant.

The parties submitted post-hearing briefs, which the American Arbitration Association forwarded to the arbitrator on November 29, 2004.

Issue

Did the Borough have just cause to terminate the employment for Charles J. Guarnieri, Jr., on February 7, 2003? If not, what shall be the remedy?

Background

The parties entered into a collective bargaining agreement ("the Agreement") effective October 1, 2001 (Joint Exhibit 1). Article 17 of the Agreement provides: "No full-time police officer covered by this agreement shall be discharged, suspended or demoted except for 'Just Cause'." Any questions regarding such discipline is subject to the grievance/arbitration procedure set forth in Article 16.

By action of Borough Council, Mr. Guarnieri was hired as Chief of the Duryea Borough Police Department in September 2000. Mr. Guarnieri was a life-long resident of the Borough and had previously worked for 18 years in the police department of a nearby municipality. The Police Department consisted of three full-time officers and approximately 12 part-time officers. While Borough Council is responsible for the Police Department budget and fiscal matters, the Mayor has day-to-day responsibilities for Police Department operations and is the direct supervisor of the Chief of Police.

On February 5, 2003 a hearing was held by Borough Council regarding the employment of Mr. Guarnieri (Union Exhibit 1 is the transcript of the hearing). On February 7, 2003 Borough Council un-

animously approved a motion terminating the employment of Mr. Guarnieri. Barry J. Chromey, Esq., Borough Solicitor, wrote Mr. Guarnieri a letter dated February 14, 2003 with Borough Council's reasons for the termination action (Joint Exhibit 2). Mr. Guarnieri filed a grievance on February 20, 2003 to protest his termination and to request reinstatement with full back pay (Joint Exhibit 3). Mayor Moss replied on the following day with the Step 1 decision: "I wish to advise you that I agree with you in this matter. At this time I am advising you to proceed to the next step of the grievance procedure." (Joint Exhibit 4) Mr. Guarnieri filed an appeal to Step 2 to Ms. Dommes on February 22, 2003 (Joint Exhibit 5). On march 3, 2003, be notified Ms. Dommes of his intent to proceed to arbitration (Joint Exhibit 6). Mr. Welby wrote to the American Arbitration Association on April 18, 2003 requesting a list of arbitrators. On July 3, 2003 the Association notified J. Joseph Loewenberg that he had selected as arbitrator in this matter.

Summary of the Position of the Borough

The Borough had ample grounds to terminate the employment of Mr. Guarnieri. The Borough's solicitor, Barry J. Chromey, clarified the respective authority of the Mayor and Borough Council with regard to police operations in his letter of November 21, 2002 (Borough Exhibit 14): "...borough council has sole authority and responsibility for budgeting and scheduling the number of officers for each shift and supervising them on duty." Yet Mr. Guarnieri consistently failed to follow the directives of Borough

Council and engaged in behavior inappropriate for a police officer.

From the outset of his tenure, Mr. Guarnieri ignored the budget by scheduling extra police officers and overtime, especially for himself (Borough Exhibit 2). Borough Council in formal sessions and Council members informally cautioned Mr. Guarnieri about the unacceptable level of spending. When confronted by Council in February 2002, Mr. Guarnieri explained the prior year's scheduling pattern resulted from his getting a handle on the department, and he pledged he would remain within budgetary limits in the future. It was soon apparent the pledge was not being honored. According to the testimony of Ms. Morreale, Police Department salaries were already $8,000 to $9,000 over budget by June 2002 (Borough Exhibit 1).

On September 5, 2002, Ms. Morreale wrote to Mr. Guarnieri on behalf of Borough Council regarding three matters on which Mr. Guarnieri had been given verbal instructions but with which he has not compiled (Borough Exhibit 3). The first was Mr. Guarnieri's failure to follow the borough's purchase-order system. Not only did Mr. Guarnieri order items not directly related to police activity (Borough Exhibit 6), but also he had not obtained the necessary pre-approval of purchase orders. Even after Ms. Morreale's letter, Mr. Guarnieri continued to make purchases without prior approval (Borough Exhibit 7). The second item in Ms. Morreale's letter of September 5, 2002 was to remind Mr. Guarnieri that, despite two verbal requests at Borough Council meet-

ings. He had not yet inspected the capabilities of Glodzik's Garage as a possible towing operator in the borough. Borough council wanted the inspection completed and a written report prior to its meeting on September 18. Mr. Guarnieri never undertook the inspection or reported to Borough Council on this matter prior to his termination. The third item on the letter requested a written update on AED training for officers prior to Borough Council meeting on September 18. Mr. Guarnieri never submitted the report.

Mr. Guarnieri's only response to these directives was a letter dated September 18, 2002 to Ms. Dommes acknowledging receipt of correspondence from Ms. Morreale but ignoring its contents and insisting "...that all correspondence and questions regarding my department from yourself or any member of council be in writing consisting of a valid signature(s)..." (Borough Exhibit 5). Solicitor Chromey wrote to Mr. Guarnieri on October 1, 2002 that failure to follow the directives of the Borough Secretary would "result in disciplinary actions for insubordination" (Borough Exhibit 11).

Because Mr. Guarnieri continued to disregard the instructions of Borough Council, Council began to implement formal discipline. A letter from Ms. Morreale on November 19, 2002 noted the weekly schedule included an extra police officer, for which Mr. Guarnieri was being issued a written reprimand (Borough Exhibit 12). A second written reprimand was issued the following day for the appearance of four officers on November 18 not listed on the schedule

(Borough Exhibit 13). Solicitor Chromey wrote to Mr. Guarnieri on November 26, 2002 requesting a written statement of the duties and responsibilities of the Chief of Police (Borough Exhibit 17). He repeated the request in a letter of December 6 with a deadline of December 11 (Borough Exhibit 15). Mr. Guarnieri never compiled with this directive. On December 19, 2002, Ms. Moreale informed him that this failure had led to a third notice of reprimand (Borough Exhibit 16). The letters of reprimand continued warnings of further discipline up to and including termination.

Efforts to arrange face-to-face meeting between members of Borough Council and Mr. Guarnieri were futile. When asked to attend a private work meeting of Council in September 2002, Mr. Guarnieri let the Mayor, but not Council members, know he would not be present, yet he showed up at the public meeting 90 minutes later. In response to written instructions to attend a meeting on October 8, 2002 (Borough Exhibit 8), Mr. Guarnieri stated simply that he was unavailable (Boruogh Exhibit 9). Solicitor Chromey scheduled a mandatory meeting regarding Mr. Guarnieri's job performance with Mr. Guarnieri and Ms. Dommes for January 10, 2003 (Borough Exhibit 18). Mr. Guarnieri came to the meeting but refused to participate.

Mr. Guarnieri's personal conduct toward individual Council members reflected his hostility and was inappropriate for a Chief of Police. Mr. Orkwis testified that following a Council meeting in June 2002 Mr. Guarnieri had pinned him against a closed

door and stuck paper under his chin (Union Exhibit 1). In November 2002 Mr. Guarnieri offered no explanation or defense at the meeting. Mr. Guarnieri's conduct in his 30 months as Chief of Police had ill-served the Police Department, the Borough, Council members and cistizens of the borough. Borough Council was left with no choice but to terminate the employment of Mr. Guarnieri as Chief of Police (Joint Exhibit 2). By any standard, the termination was for just cause. The grievance should therefore be denied.

Summary of the Position of the Police

The Borough did not have just cause to terminate Mr. Guarnieri. Indeed, the charges for its disciplinary action lacked foundation, had been the basis of prior discipline, or had never been deemed serious enough to warrant discipline. The charges were of insufficient merit to warrant the discipline. Moreover, the Borough violated basic due-process rights of Mr. Guarnieri.

The Borough's major complaint concerning Mr. Guarnieri's operation of the Police Department was that he scheduled extra officers, which as largely responsible for the department's budgetary overruns in 2001 and 2001. This complaint led to the issuance of two written reprimands in November 2002. Borough Council was aware that Mr. Guarnieri continued to schedule extra officers at the direction of the Mayor, who was his immediate supervisor. Mr. Guarnieri was clearly caught between two political forces. Once Solicitor Chromey clarified the respective authorities of the Mayor and Borough Council with regard to po-

lice operations, Mr. Guarnieri compiled with the scheduling instructions of Borough Council. In other words, the Borough had no further reason to discipline Mr. Guarnieri on this account.
Mr. Guarnieri was charged with not providing a written list of job duties and responsibilities. Defining job responsibilities is a management function that should never have been assigned to Mr. Guarnieri. Initially Solicitor Chromey made a suggestion and later a request to Mr. Guarnieri that he provide such a list. Although Solicitor Chromey had no supervisory responsibility for the Chief of Police, he issued a written directive to Mr. Guarnieri on December 6, 2002. When Mr. Guarnieri did not comply, the Borough issued a reprimand (Borough Exhibit 16). No further directives regarding this matter were issued.

In the Solicitor's letter of February 17, 2003, the list of charges to justify the termination included a number of alleged improprieties for which Mr. Guarnieri was never disciplined and which the Borough excused in other venues. One such instance was Mr. Guarnieri's failure to follow the purchase-order policy. As noted in his letter of November 19, 2002 to Ms. Dommes. Mr. Guarnieri had never received a copy of the policy (Borough Exhibit 4). Ms. Dommes testified at the meeting on February 5, 2003 that Mr. Guarnieri complied with the policy once he had been given a copy.

A second allegation was the failure to attend counseling meetings. Mr. Guarnieri explained that in one case he received notice from the Borough only the day before the scheduled meeting and that in

another he had a personal conflict. He did not even receive a verbal warning for these alleged discrepancies. Mr. Guarnieri met the requirement of attending the meeting on January 10, 2003.

A third allegation was that Mr. Guarnieri failed to follow the directive of the Borough Secretary. Supervisory authority over the Chief of Police was shared by the Mayor and Borough Council. The Borough Secretary did not have authority to issue directives to Mr. Guarnieri. When she did, Mr. Guarnieri requested that Council deal with him directly (Borough Exhibit 5). Mr. Guarnieri never received a response, not even to the effect that Council had designated that Borough Secretary to represent its interests in the operation of the Police Department. Nor did Council discipline Mr. Guarnieri for this alleged violation.

The Borough lacks proof of the allegations of individual Council members that Mr. Guarnieri engaged in inappropriate behavior. Mr. Orkwis' allegation of being physically confronted by Mr. Guarnieri in June 2002 remains unsubstantiated. The lack of corroboration is all the more remarkable since it supposedly occurred at the end of a public Council meeting. Moreover, Mr. Guarnieri and Mayor Moss presented a version of the incident different from that of Mr. Orkwis. In any event, Mr. Orkwis did not think the matter serious enough to inform fellow council member of the incident promptly or ever to ask them to initiate disciplinary action. Likewise, Mayor Moss and Mr. Guarnieri denied that Mr. Guarnieri had threatened Mr. Webb in the Mayor's office in Novem-

ber 2002. Mr. Webb filed a civil suit, but the complaint was dismissed by the local magistrate, and Borough Council never disciplined Mr. Guarnieri upon learning of the allegation.

The Borough committed numerous due-process errors in disciplining Mr. Guarnieri. These errors were sufficiently egregious to determine that Council's termination throughout the disciplinary process. As noted by the Pennsylvania Labor Relations Board, the Borough did not permit Mr. Guarnieri to have legal counsel of Union representation at the investigatory meeting on January 10, 2003. When Mr. Guarnieri learned at the meeting that it could lead to discipline, his request for representation was rebuffed. The Borough continued to deny Mr. Guarnieri representation when it learned that his legal counsel would be unavailable for the disciplinary meeting scheduled for February 7, 2003. Nothing prevented the Borough from postponing the meeting to allow attendance by Mr. Guarnieri's counsel and to ensure protection of Mr. Guarnieri's rights.

A different kind of procedural error was the Borough's failure to cite sections of law or the Borough Civil Service Code when issuing discipline. Article 17 of the Agreement requires the Borough to state reasons for discipline "...in accordance with either the Police Tenure Act, 53 P.S. 811-816 or civil service..." The Borough's letter setting for the reasons for the termination did not include any reference to the state or civil service code in the charges on which the termination action was based.

The adjudicatory process of the disciplinary hearing was a sham that violated Mr. Guarnieri's due-process rights. The members of Borough Council were the arbiters in determining whether Mr. Guarnieri was guilty of charges. Their role was to judge impartially whether the evidence presented supported each charge. The hearing procedure revealed an inherent bias. Six of the seven Council members testified at the hearing. Some were directly involved in particular charges. It is fundamental that persons cannot adjudicate matters in which they are prosecutors. In other words, Mr. Guarnieri never received a fair hearing on the charges.

Even after the termination of Mr. Guarnieri, the Borough continued to violate his contractual rights. Article 26 of the Agreement provides that "...the municipality shall not make any public comment on the reason for any disciplinary action brought against the officer." In the Sunday Dispatch of March 16, 2003 Borough Council published a letter defending the termination of Mr. Guarnieri (Union Exhibit 3). Since Mr. Guarnieri never agreed to publication of the letter, the Borough clearly violated the Agreement.

The Borough has not established just cause to terminate Mr. Guarnieri. Throughout Mr. Guarnieri's ordeal, it failed to substantiate the charges brought against him; it neglected to observe the terms of the Agreement and relevant statutes; and it disregarded employees' due-process rights. The grievance should be sustained, and Mr. Guarnieri should be reinstated with back pay and benefits.

Discussion

The matter of Mr. Guarnieri's termination involves numerous substantive and procedural issues. The arbitration hearing included two full days of hearing and the introduction of 30 exhibits, one of which was the transcripts of another proceeding. The post-hearing briefs added twelve exhibits of arbitration awards, court decisions, PLRB determinations, etc. No wonder the case is complex, and the outcome not straightforward.

All witnesses at the arbitration hearing agreed that Mr. Guarnieri's difficulties with Council multiplied in late summer 2002. Certainly before then Borough Council had been aware of Police Department budget problems as well as some personal encounters involving Mr. Guarnieri, but Council members individually and as a group felt they might be able to work with Mr. Guarnieri on the major issues. Council's attempt to reorganize the Sewer Authority may have been a critical turning point. Ms. Dommes and Mr. Guarnieri concurred that she had asked him to intervene with the Mayor in an effort to prevent a veto of Council's bill. Mr. Guarnieri refused the request, and the Mayor vetoed the bill. Although Mr. Guarnieri had wanted to keep himself and the Police Department out of politics, it did prove to be possible. Mr. Guarnieri and the Mayor were now seen as allies, and Mr. Guarnieri made no effort to dispel that view. As relations between the Mayor and Council deteriorated, so, too, did relations between Mr. Guarnieri and Council. Council's tolerance for Mr. Guarnieri's independent ways dissipated and its

efforts to regain control over Police Department spending increased. What Mr. Guarnieri did not fully appreciate was that the Mayor has limited responsibilities regarding the Police Department and that ultimate authority for the Chief of Police lies with Council. Even Council members who were viewed as supported of the Mayor found themselves unable to defend Mr. Guarnieri. The upshot was a unanimous vote on February 7, 2003 in whether the Council's action constituted discharge for just cause. The question includes substantive and procedural aspects.

Borough Council terminated the employment of Mr. Guarnieri because of twelve reasons set forth in Mr. Chromey's letter of February 14, 2003 (Joint Exhibit 2). The Borough withdrew the first and tenth in the list of reasons at the outset of the arbitration hearing. Although the Borough introduced evidence of other alleged misconduct, such as the Fire Police identification issued to Mr. Radle, such evidence was not part of the charges brought against Mr. Guarnieri at the time of his termination and hence was not a cause for the decisions to discharge him. The Borough must justify its disciplinary action for reasons stated at the time of its decision; it cannot add justifications after the fact.

Credibility was an issue in several of the remaining ten reasons for terminating the employment of Mr. Guarnieri. In particular, the Police questioned the accuracy of the accounts provided by Messrs. Webb and Orkwis in their respective encounters with Mr. Guarnieri. Both Mr. Guarnieri and Mr. Moss vi-

gorously denied the versions of the Council members. Mr. Webb's testimony at the Council meeting of February 5, 2003 was more limited and less alarming than that presented at the arbitration hearing and in his contemporaneous notes (Borough Exhibit 12). All in all, however, I found the testimony of the two Council members more credible than that of the Police witnesses.

A major problem remains nonetheless with the charges relating to the two Council members. Regardless of the validity of their accounts, Council never considered them prior to the meeting of February 5, 2003. Although the incident with Mr. Orkwis occurred in June 2002, Mr. Orkwis testified he did not bring it to Council's attention immediately because he though it more important to deal with the budget problems involving the Police Department. Mr. Webb advised other Council members of his encounter with Mr. Garnieri in November 2002 on the following day, but Council left it to the courts to deal with the matter. In both situations, therefore, Council as the employer took no action. It did not investigate the situations, let alone award any admonition or discipline to Mr. Guarnieri. The administration of a fair disciplinary procedure requires prompt investigation of each occurrence and imposition of reasonable discipline to correct improper behavior soon thereafter. If Council took no action at the time each situation took place, it was inappropriate to raises these matters for the first time in February 2003 as a basis for discipline. This conclusion does not exculpate Mr. Guarnieri's behavior, but it does bar using

these matters as reasons for justifying the termination action.

Council's primary complaint with Mr. Guarnieri's administration of the Police Department was his failure to adhere to the budget. Council believed the scheduling of extra police officers was a major contributor to the discrepancy between budget and actual expenditures. Overtime also added to the problem. Mr. Guarnieri was made aware of Council's concern in November 2001 and then again in February 2002. Council members reiterated their anxiety informally on many occasions thereafter. The list of charges in the letter of termination refers to verbal warning for scheduling of police officers and budget problems as well as "to failure to manage police budget in accordance with the provisions of the collective bargaining agreement." While Council expressed its distress individually and as a body in 2002, no evidence was presented that Mr. Guarnieri ever received formal verbal warnings about scheduling and/or budget in an disciplinary context. Yet there is no doubt that council's concern and interest in restraining spending budget limits were fully and repeatedly conveyed to Mr. Guarnieri.

The topic of police scheduling was the basis of the first two formal written reprimands issued by the Borough. On November 19, 2002 Mr. Guarnieri received a reprimand for scheduling an extra police officer on two occasions during the week of November 17 (Borough Exhibit 12). The following day Mr. Guarnieri received a reprimand for extra police officers on the street on November 18, 2002 (Borough Ex-

hibit 12). Mr. Guarnieri felt the reprimands were unwarranted. In the first instance, he claimed he was caught between directives of Council and the Mayor. At the hearing on February 5, 2003, Ms. Dommes referred to a letter from Mr. Guarnieri dated November 18, 2002 stating that Mayor Moss had ordered him to maintain police schedules and asking for clarification (Union Exhibit 1, p. 25). That clarification was forthcoming in Mr. Chromey's letter of November 21, 2002 (Borough Exhibit 14). As for the extra police officers on November 18, 2002, Mr. Guarnieri explained those officers were paid under a separate grant budget, though he admitted he had not listed them on the weekly schedule. Mr. Guarnieri was aware of Council's expectations with respect to police scheduling. Nothing in the testimony or evidence gives reason to overturn the grounds for these disciplinary actions. It should be noted, however, that the two written reprimands for scheduling errors were issued on consecutive days for actions that occurred prior to the first violation. Mr. Guarnieri did not have sufficient time between the two reprimands to demonstrate corrective behavior for his improper action. After the second reprimand, the Borough did not issue subsequent discipline for scheduling activities it considered improper.

The Borough sent Mr. Guarnieri a third written reprimand on December 19, 2002 for his continued failure to provide a written report on his job duties and responsibilities (Borough Exhibit 16). Mr. Guarnieri testified that the mayor had instructed him to ignore the request, and the Police argued that Solicitor Chromey had no authority to issue a direc-

tive to the Police Chief, especially one that was the responsibility of management to fulfill. Mayor Moss offered no testimony on this matter. It seems clear that Solicitor Chromey intervened, not on his own initiative, but rather on behalf of Council after Mr. Guarnieri ignored prior verbal and written requests. Although final responsibility for creating job descriptions rests with management, in this case Borough Council, it is not uncommon for management to seek the input of employees to ensure a comprehensive list of duties and responsibilities and to help gain agreement on the result. In other words, the request made of Mr. Guarnieri was not inappropriate; his unwillingness to the point of outright refusal was. When the list of charges includes a reference to failure to comply with reprimands, the only reprimand it can apply to is the failure to provide a written report on job duties.

Included in the reasons for termination was failure to attend counseling meeting with the employer. Ms. Dommes testified that such meeting had been scheduled in September, October, and December 2002 to no avail. The Borough contended Mr. Guarnieri attended the meeting on January 10, 2003 only because it was held during his regular work hours and because of his threat of disciplinary action if he did not attend (Borough Exhibit 18). Mr. Guarnieri explained that he received notice of the September meeting only one day before and that he had a personal conflict with the October meeting. Even were the excuses legitimate, one may conclude that Mr. Guarnieri was not eager to attend counseling meetings and made no attempt to schedule them at a

mutually satisfactory time. At the same time, the Borough never disciplined Mr. Guarnieri for failure to attend counseling meetings or, prior to the January 2003 meeting, indicated that failure to attend could result in discipline. The failure to attend counseling meetings is therefore more an indication of Mr. Guarnieri's attitude and lack of cooperation than a separate reason for discharge.

The final two charges are general in nature, related to each other, and applicable to many of the previously discussed charges: failure to cooperate with the Borough Secretary and engaging in a pattern of insubordination. Ms. Morreale testified at length at the Council meeting of February 5, 2003 and at the arbitration hearing about the difficulties she encountered in dealing with Mr. Guarnieri, particularly in the final five months of his tenure. These difficulties included Mr. Guarnieri's failure to comply with Council directives that she communicated to Mr. Guarnieri (Borough Exhibit 3), failure to follow policies such as the purchase-order system, and failure to abide by the scheduling requirements of the Agreement (Borough Exhibits 12, 13). Mr. Guarnieri's response was that the directives had not been communicated directly by Council (Borough Exhibit 5), that he had not been furnished copies of policies (Borough Exhibit 4), and that he was an innocent victim caught between the demands of Council and the mayor. None of Mr. Guarnieri's responses is convincing. The established practice of the Borough had been for the Borough Secretary to communicate Council decisions to department heads and Borough employees. Ms. Morreale made it clear in her letter

of September 5, 2002 that she was writing "[a]s per the request of the members of the Duryea Borough Council..." (Borough Exhibit 3). It also seems unlikely that Mr. Guarnieri was ignorant of the new purchase-order policy passed by Council in 2002, even if he had not received a personal copy of the policy. No evidence was forthcoming regarding any explicit orders from the Mayor that were contrary to those of Council. If Mr. Guarnieri believed that he had received contradictory instructions, he made no effort to convey his predicament to Council or attempt to seek a resolution of the differences. With respect to the two charges, Mr. Guarnieri's characteristic conduct from September 2002 onward was evasion of following directives and policies of Council until the issue came to a head. Once Mr. Guarnieri could no longer deny knowledge of a directive or policy, such as purchase ordering or police scheduling, he would be inclined to follow it. According to Mr. Morreale, some expectations to this inclination continued, such as Mr. Guarnieri's not submitting police schedules to her in late December and never presenting a written list of job duties. While Mr. Guarnieri can properly be charged with lack of cooperation with Ms. Morreale, his outright insubordination was the exception rather than the rule.

To summarize the findings on the substantive charges against Mr. Guarnieri, Mr. Guarnieri was guilty of many of them, but that in and of itself may not serve as justification for Council's disciplinary action. Some charges, such as those involving encounters with individual Council members, must be excluded because they were never brought to Mr.

Guarnieri's attention as serious offenses prior to February 2003. Other charges, including informal verbal warning for misadministration of the Police Department in 2002, may be substantively correct but cannot be included in reasons to support the discharge because such warnings were not viewed as steps in the disciplinary system. [On the other hand, Mr. Guarnieri willfully and deliberately engaged in behavior over a period of time that thwarted the wishes of Council and that frustrated the Borough Secretary. His outright refusal to follow orders was limited, especially once he had received written reprimands for specific misconduct. The most significant directive Mr. Guarnieri did not comply with after receiving a reprimand was the one to submit a written list of job duties. However, Mr. Guarnieri never fulfilled the requests of Council, as transmitted by the Borough Secretary, to complete inspection of a garage and to furnish a training report. He continued to ignore discrepancies between police schedules and police timecards, making it difficult to audit expenditures (Union Exhibit 1, pp. 45-46). Over a period of time he also displayed a non-cooperative attitude and a general reluctance to comply with requests and directives.]

Were the proven charges sufficient to warrant just cause for termination? The record reveals, that Mr. Guarnieri received but three written reprimands, with two of those issued on consecutive days. According to Ms. Dommes, after Mr. Guarnieri received the first two reprimands, he complied with the directive not to schedule extra police officers (Union Exhibit 1, p.27). The Borough notified Mr. Guarnieri on De-

cember 16, 2002 that he was receiving a written reprimand for failing to furnish a written statement of job duties and that continued failure "will result in further action being taken by Borough Council against you" (Borough Exhibit 16). Council took no further action on this matter until it terminated Mr. Guarnieri. Certainly some of the other proven charges cited by the Borough warranted timely investigation and could have been the basis of discipline. By not doing so, Council members individually and as a group may have contributed to Mr. Guarnieri's attitude and actions. They elected to overlook matters that should have raised alarm and that were grounds for possible discipline. Budgetary concerns and Mt. Guarnieri's local relationships were not an excuse for their negligence. Council also included charges in the reasons for Mr. Guarnieri's dismissal that were outdated. Council thus weakened the case for terminating the employment of Mr. Guarnieri. Had the Borough investigated each allegation against Mr. Guarnieri in timely fashion and used progressive discipline when it found violations, it would have strengthened its position that the termination was for just cause.

There remain for consideration the numerous procedural questions of the Borough's handling of Mr. Guarnieri's case. The Police contended that the alleged procedural issues were serious enough to overturn the discharge action, regardless of the outcome of the substantive matters. No factual disagreements exist in the matters regarding procedural questions. The question raised is whether the al-

leged errors are sufficiently egregious to affect the outcome.

It is undisputed that the Borough effectively denied Mr. Guarnieri representation at the meeting on January 10, 2003. When Mr. Guarnieri entered the meeting, he inquired about the nature of the discussion, after which he asked for legal and Police representation. The meeting was to investigate Mr. Guarnieri's conduct as Chief of Police, with discipline as a possible result. Mr. Guarnieri was clearly entitled to representation under such circumstances. The Borough erred in denying him his Weingarten rights to representation. It is also clear, however, that the Borough obtained no new information at this meeting and did not rely on Mr. Guarnieri's behavior at this meeting to justify his termination. The most the Police can claim is that he was deprived of an opportunity to tell his side of the story with a representative present, but representation likely would not have changed anything. No reason was offered why I should not accept the finding of the Pennsylvania Labor Relations Board, PF-C-030210E, and affirmed by Commonwealth Court of Pennsylvania, 2004 WL 236194.

The lack of representation for Mr. Guarnieri at the meeting on February 7, 2003 is more serious to my mind. The purpose of the meeting was to obtain testimony from Council members about Mr. Guarnieri's performance to determine if he deserved discipline. A representative for Mr. Guarnieri could have questioned witnesses and perhaps guided Mr. Guarnieri through a presentation of his defense. Mr.

Guarnieri's legal counsel had given notice a week prior to the scheduled meeting that he would be unable to attend, with a request for continuance until later in the month. No persuasive justification was offered for not rescheduling the meeting. If Council had been concerned about Mr. Guarnieri acting as Chief of Police in the interim, it could have suspended him pending the outcome of the disciplinary meeting. Perhaps the presence of Mr. Guarnieri's counsel would not have affected the outcome, but proceeding with the meeting when adequate notice of counsel's absence had been given was a grave breach of due process.

The Police objected to Council acting as prosecutor and judge in this matter. Six of the seven members of Council testified at the meeting of February 5, 2003. In truth, however, the final three Council witnesses were brief and did not introduce any negative evidence; in the contrary, one was decidedly complimentary to Mr. Guarnieri. The fact remains that Council has the authority to hire and discharge the Chief of Police and thus was empowered to make the decision on Mr. Guarnieri's fate. Given that Council unanimously voted to discharge Mr. Guarnieri on February 7, 2003, it would have made little difference if one or more individual Council members had disqualified themselves from the final decision.

The Police noted that the letter of termination (Joint Exhibit 2) lacked citations to the Borough Code or the Police Tenure Act, as required by Article 17 of the Agreement. It is incontrovertible that the letter

contains no specific citations. Yet it is not difficult to find among the reasons set forth in the letter the corresponding paragraphs in Section 46190 of the Borough Code, e.g., (2) neglect or violation of any official duty, and (4) inefficiency, neglect, intemperance, immortality, disobedience or orders, or conduct unbecoming a police officer. In some ways the reasons in the letter provide more substance and detail than do the reasons in the Borough Code. As far as I am concerned, the absence of citations was more a technical mistake than a meaningful violation of due process.

Another procedural problem raised by the Police was Council's letter in the newspaper on March 16, 2003 (Police Exhibit 3). Members of Council may have been upset by rumors, innuendoes and community reactions to its handling of Mr. Guarnieri, but pique is insufficient justification for a public written statement. Since the letter appeared more than a month after Council's decision to terminate Mr. Guarnieri, it had nothing to do with whether or not just cause existed for the termination. Nevertheless, the Police could properly object to Council making public comment about the disciplinary action. Publication of the letter was a violation of Article 26 of the Agreement.

To summarize, only two procedural objections raised by the Police were truly serious enough to possibly affect the outcome of this proceeding. The first was the failure to postpone the meeting of February 7, 2003 in order that Mr. Guarnieri's counsel could be present. Given the circumstances, the Borough made no attempt to accommodate a reasonable request

from Mr. Guarnieri for representation at the meeting. The failure to allow such representation was a fundamental violation of Mr. Guarnieri's due-process rights and could have affected Council's decision to discharge Mr. Guarnieri. The second significant procedural violation was the publication of a letter by Council commenting on reasons for Mr. Guarnieri's termination, a clear violation of the Agreement. These two procedural matters are different in nature and even in degree of significance. Perhaps neither one alone nor the two together would have set aside a strong substantive case against Mr. Guarnieri, but by the same token they cannot be excused without consequence.

In considering the issue of just cause in this case, it is evident that the Borough encountered problems in both the substantive merits and the procedural aspects. The evidence shows that Mr. Guarnieri was guilty of using tactics to evade, if not defy, the authority of Borough Council can of attempting to intimidate Council members. Certainly his conduct deserved discipline. Mr. Guarnieri had received three written reprimands, with the first two correcting the specified unacceptable behavior. No major violation occurred between the last reprimand and the termination action. Council has every right to expect any Chief of Police to follow its policies and directives and to abide by budget constraints. At the same time, Council must confront unacceptable conduct when it occurs and utilize discipline in a manner that conveys to employees its expectations and the consequences of not doing so. For the most part that was not done in this case. Moreover, in initiating and

completing the termination, Council committed significant procedural errors, which further weakened the Borough's position. Mr. Guarnieri's behavior cannot be condoned and is worthy of discipline, but the Borough has failed to prove it had just cause for its decision to discharge Mr. Guarnieri on February 7, 2003.]

Award

[The Borough did not have just cause to terminate the employment of Charles J. Guarnieri, Jr., on February 7, 2003. The Borough shall reinstated Mr. Guarnieri to his position as Chief of Police within 30 days of this award. Further, the Borough shall pay Mr. Guarnieri the basic salary of Chief of Police from February 7, 2004, less any pay he received from other employment since then. The time between February 7, 2003 and February 6, 2004 shall be regarded as a disciplinary suspension.

/s/
J. Joseph Loewenberg
Arbitrator

December 28, 2004

Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

Phone: (570) 655-2829 Fax: (570) 457-4792
Duryea Borough
315 Main Street — Duryea, PA 18642
Lois Morreale
Borough Secretary-Treasurer

January 21, 2005

Charles Guarnieri
312 Main Street
Duryea, Pa. 18642

Dear Mr. Guarnieri,

The Duryea Borough Council has issued the following directives to which you must follow:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.
2. You are not to attend council meeting as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed for your department.
4. The dayshift office must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly written report.
5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be handed in on Monday.
6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directives which you receive from either the borough solicitor or the borough secretary should be treated as a directive of borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or the borough solicitor.
7. You will submit a weekly report to the borough secretary on the following Monday by 1:00 p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the time at which the tasks were performed.

In addition, you will include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.
9. The police car is to be used for official business only. Only borough officials and passengers of officials business only are allowed in the police car.
10. The Duryea municipal excerpt from this smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.
11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00 a.m.-3:00 p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

Sincerely,

/s/

Lois Morreale
Borough Secretaty

Cc: Mayor Moss

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES J. GUARNIERI, JR.	CIVIL ACTION — LAW
Plaintiff	
v.	JURY TRIAL DEMANDED
DURYEA BOROUGH, DURYEA BOROUGH COUNCIL, ANN DOMMES, Individually and in her Official Capacity as Council President, LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman, EDWARD ORKWIS, Individually and in his Official Capacity a s Councilman, ROBERT WEBB, Individually and in his Official Capacity as Councilman, AUDREY YAGER, Individually and in her Official Capacity as Councilwoman, JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman, AKULONIS, Individually and in his Official Capacity as Councilman	
Defendants	NO.

COMPLAINT

NOW comes the Plaintiff, CHARLES J. GUARNIERI, JR., by his attorney, Cynthia L. Pollick, Esquire, and files the following Complaint against Defendants and avers as follows:

PARTIES

1. Plaintiff, CHARLES J. GUARNIERI, Jr., presently resides in Luzerne County. Plaintiff GUARNIERI (hereinafter referred to as "CHIEF GUARNIERI" is the Chief of Police for Defendant, DURYEA BOROUGH (hereinafter referred to as "DURYEA") and was deprived wages, employment opportunities, which in-effect is a demotion, and his rights of free speech were infringed upon on January 21, 2005, and continuing thereafter, after being reinstated pursuant to an Arbitration Award overturning the Defendants' decision to terminate his employment as Chief of Police in 2003.

2. CHIEF GUARNIERI has been a dedicated law enforcement officer for over 20 years competently and tirelessly serving the citizens of Luzerne County. Before accepting the position of Chief of Police of Duryea in September 2000, CHIEF GUARNIERI was employed with the Pittson Township Police Department for 17 years.

3. CHIEF GUARNIERI seeks redress for violations of his constitutional rights of due process, including but not limited to the fact that CHIEF GUARNIERI was never given a pre- or a post-

deprivation hearing. CHIEF GUARNIERI seeks redress for violations of his First, Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983.

4. Defendant, DURYEA BOROUGH, is a Commonwealth municipality with a principal office at 315 Main Street, Duryea, Pennsylvania.

5. Defendant, DURYEA BOROUGH OF COUNCIL is a part of the Commonwealth municipality of the Borough of Duryea, and operates out of 315 Main Street, Duryea, Pennsylvania.

6. Defendant, ANN DOMES, is the President of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

7. Defendant, LOIS MORREALE, is the Borough secretary of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

8. Defendant, FRANK GROBLEWSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

9. Defendant, EDWARD ORKWIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

10. Defendant, ROBERT WEBB, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

11. Defendant, AUDREY YAGER, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

12. Defendant, JOAN ORLOSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

13. Defendant, ALFRED AKULONIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

14. At all times material hereto, Defendants, DURYEA BOROUGH OF COUNCIL, DOMMES, MORREALE, GROBLEWSKI, ORKWIS, WEBB, YAGER, ORLOSKI, AKULONIS were servants, agents, and/or employees of Defendant Borough of Dunmore, and were acting under color of state law when they engaged in official policy, custom, and decision to deprive CHIEF GUARNIERI of his right to free speech and his right not to be harmed in absence of "just cause".

JURISDICTION

15. This suit is brought and jurisdiction lies pursuant to the 42 U.S.C. § 1983 for constitutional violations of CHIEF GUARNIERI's rights to pur-

suant to the First, Fourth and Fourteenth Amendments.

COUNT I

VILOATION OF CHIEF GUARNIERI'S CONSTITUTIONAL RIGHT TO DUE PROCESS PRE- AND POST-DEPRIVATION RIGHT PLAINTIFF V. DEFENDANTS

16. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through fifteen (15) above as if set forth herein at length.

17. On January 21, 2005, CHIEF GUARNIERI was reinstated pursuant to an Arbitrator's award after a long struggle with Defendants who terminated his employment in 2003.

18. Defendants vigorously opposed CHIEF GUARNIERI's return through the arbitration process.

19. Upon his return, Defendants restricted CHIEF GUARNIERI in his job duties, speech, opportunities for wages as well as disciplined in retaliation for him petitioning the government, his association with the union, and speaking out against Defendants on matters of public concern. The actions of Defendants in restricting his job duties, in essence, was a demotion.

20. Defendants provided CHIEF GUARNIERI with a list of restrictions. The laundry list of restrictions included but not limited to "you are not to attend council meeting as the chief of police...",

"you are to go home at the end of your eight hour shift", "you must patrol 4-5 hours during your eight hour shift", "you are not to work more than eight hours per day or more than 40 hours per week unless you receive express permission from borough Council", and must submit weekly report of "...detailed description of your daily activities".

21. Obviously, Defendants were restricting CHIEF GUARNIERI's job performance by placing ridiculous, unprecedented, humiliating requirements on CHIEF GUARNIERI, which were not part of the CBA and violated the terms of CHIEF GUARNIERI's employment and were placed on him in retaliation for him exercising his unconstitutional rights.

22. CHIEF GUARNIERI's position was and is protected by the Collective Bargaining Agreement (hereinafter "CBA").

23. CHIEF GUARNIERI did nothing to cause Defendants to retaliate against him.

24. Despite the fact that CHIEF GUARNIERI could only be harmed for "just cause", Defendants still infringed on his rights of free speech, his opportunity to make a living, and restricted his engagement in other activities which were and are an employment benefit to him as well as formally disciplining him.

25. CHIEF GUARNIERI has been continually harassed by Defendants.

26. CHIEF GUARNIERI has a property interest in his position as a Chief of the Police Department.

27. Defendants never gave CHIEF GUARNIERI oral or written notice why his right to free speech and opportunity to make a living was infringed, he was disciplined, and prohibited from engaging in activities which are an employment benefit to him.

28. Defendants never prohibited CHIEF GUARNIERI with a pre-deprivation hearing, or any post-deprivation hearing as required by law.

29. Defendants have intentionally failed to provide CHIEF GUARNIERI with any hearing of or notice of charges, and therefore, have deprived CHIEF GUARNIERI of his constitutional right to pre- and post- deprivation hearings.

30. Defendant Duryea Borough was deliberately indifferent to CHIEF GUARNIERI's rights, and intentionally failed to train its employees adequately, and also failed to have policies in place prohibiting the conduct in question.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT II
FIRST AMENDMENT RETALIATION CLAIM FREEDOM OF PETITION AND SPEECH PLAINTIFF V. DEFENDANTS

31. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty (30) above as if set forth herein at length.

32. CHIEF GUARNIERI petitioned the government by filing several grievances against Defendants.

33. CHIEF GUARNIERI also engaged in speech on Police and Union matters with Defendants once he was finally reinstated.

34. CHIEF GUARNIERI was retailed for filing grievances and engaging in free speech by being criticized, denied employment opportunities, harassed, disciplined, restricted in speech as well as restricted in his ability to perform his hob duties, which in essence, is a demotion.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT III
VIOLATION OF SECTION 1983 FIRING IN RETALIATION FOR CHIEF GUARNIERI'S ASSOCIATION WITH THE UNION PLAINTIFF V. DEFENDANTS

35. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty-four (34) above as if set forth herein at length.

36. CHIEF GUARNIERI was affiliated with the Fraternal Order of Police, and assisted the union in matters.

37. Defendants were fully aware of CHIEF GUARNIERI's association with the Fraternal Order of Police, and in retaliation for the same harmed him as described above.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

A jury trial is demanded on all counts.

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Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

AMERICAN ARBITRATION ASSOCIATION

* * * * * * * * * *

In the Matter of Arbitration
between

THE DURYEA BOROUGH
POLICE DEPARTMENT

- and -

BOROUGH OF DURYEA

GRIEVANCE:
Directives
Grievance

AAA CASE NO. 14 3-0 00419
05 RVB

* * * * * * * * * *

JURISDICTION, BACKGROUND and POSITIONS OF THE PARTIES

This matter arises from a Grievance (dated January 29, 2005), initiated on behalf of Charles J. Guarnieri, Jr. (the Grievant), Chief of Police (Chief or Chief Guarnieri) of the Borough of Duryea (Luzerne County), by his exclusive bargaining agent, THE DURYEA BOROUGH POLICE DEPARTMENT (a/k/a Duryea), a public employer (Borough or Employer). The Bargaining Unit consists of the Grievant and two (2) other full-

time police officers (Joint Exhibit 6A – Pennsylvania Labor Relations Board Examiner's Decision No. PF-C-03-21-E, December 11, 2003, 34 PPER P 158, LRP at 2).

This Grievance claims that on January 21, 2005, the Borough secretary issued a "Directive" containing 11 points, each of which the __ion claims ". . . changed existing, established and recognized past practices as well as changed the terms and conditions . . . [of the Chief's employment] . . . ." (Joint Exhibit 3 at 1). The Grievance was not resolved in the Grievance procedure.

The Police appealed this matter to arbitration on March 3, 2005 and demanded that as the remedy the Borough Council be ordered to withdraw the Directive, return to the "status quo prior" to the issuance of the Directive, and not to discriminate against the bargaining unit and its members in the future.

The Borough denied the Grievance because "it is unclear how the directives which you [the Union] contest have altered past practice . . . " [or violate the collective bargaining agreement] (Joint Exhibit 3 at 4).

Hereafter, either the Borough or Police may be referred to as a "Party;" and when referring to both, they may be referred to as the "Parties."

Arbitration Hearings were held on July 19, and September 12, 2005, in Duryea borough,

Pennsylvania, in the Duryea Municipal Building, before Edward A Pereles, the Arbitrator selected by the Parties (under the terms of their Collective Bargaining Agreement (CBA) and their Settlement Agreement (Agreement)) and the then current (July 1, 2005) Rules (the Rules) for Labor Arbitration of the American Arbitration Association (AAA) to hear the matter, to issue rulings, and to render an Award with an Opinion on the Issues placed before him.

The Bargaining Unit was represented by Anthony M. Caputo, Esquire, and the Borough by Scott E. Blissman, Esquire. There was no challenge to substantive or to procedural arbitrability by the Parties and they agreed that the matter would be heard on the merits.

One or both of the Parties asked the Arbitrator to become familiar with the pertinent provisions of Articles 1, 11, 15, 16 and 18 of the CBA (in effect from January 1, 2003 through December 31, 2003 (Joint Exhibit 1)); modified and extended by a "Settlement" Agreement (and Items 5. and 6. therein) effective "January 1, 2004 and continuing through December 31, 2005" (Agreement) (Joint Exhibit 2); "Relevant Portions of the Borough Code from Chapter 91, 53 P.S. Section 46121 (Joint Exhibit 7); and the Directive(s) (sent to "Mr." Guarnieri on Borough stationery, dated January 21, 2005, signed by Borough Secretary Lois Morreale (on behalf of the Duryea Borough Council)) (Joint Exhibit 4).

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1
BARGAINING UNIT

The Borough as it has in the past recognized the Duryea Borough Police Bargaining Unit as the sole representative of all full time police officers. The Borough shall not discriminate against a member of the bargaining unit, or try to discourage membership in said bargaining.

ARTICLE 11
STATE AND FEDERAL LAW

Nothing in this agreement shall be construed to require either of the parties to act contrary to any state or federal law. In the event any such condition arises, it is agreed that this agreement shall be deemed to be modified to the extent necessary to comply with such law(s). All other provisions shall continue in force.

ARTICLE 15
SHIFT SCHEDULES AND SHIFT CHANGES

1st – 7:00 a.m. (0700 hrs.) to 3:00 p.m. (1500 hrs.)
2nd 300 p.m. (1500 hrs.) to 11:00 p.m. (2300 hrs.)
3rd 11:00 p.m. (2300 hrs.) to 7:00 a.m. (0700 hrs.)

Overlap shifts 7:00 P.M. (1900 hrs.) to 3:00 A.M. (0300 hrs.) are to be used any 4 nights every week without exceptions. Other overlapping

shifts may be used at the discretion of the Chief of Police with prior approval from Council.

ARTICLE 16
GRIEVANCE PROCEDURE

GRIEVANCE PROCEDURE: A grievance shall be defined as any dispute involving the interpretation and/or application of the terms of this Agreement, or any dispute involving the interpretation and/or application of the Borough's policies or procedures which affect the terms and conditions of employment, including matters of discipline. . . . . .

. . . . . .

The arbitrator shall neither add to, subtract from, nor modify the provision of this agreement or of the arbitration awards. The arbitrator shall confine him/herself to the precise issue submitted for arbitration and shall have no authority to determine any other issues not so submitted to him/her.

The decision of the arbitrator shall be final and binding on both parties. The arbitrator shall be requested to issue his/her decision within thirty (30) days after the hearing or receipt of the transcript of the hearing. The period may, however, be waived by the parties or at the request of the neutral arbitrator as circumstances warrant.

. . . . . .

All fees and expenses for the neutral arbitrator shall be paid for by the employer.

ARTICLE 18
PAST PRACTICE

All existing benefits and practices previously enjoyed by the members of the Collective Bargaining Unit and the Borough and not modified by this Agreement shall remain as is.

SETTLEMENT AGREEMENT

5. **Discharge, Suspension or Demotion (Article 17)** Article 17 shall be deleted and replaced with the following amended language:

> *No full-time police officer covered by this agreement shall be discharged, suspended or demoted except for "just cause" as defined in the civil service provisions of the Pennsylvania Borough Code, 53 P.S. Section 46190.*

6. **As Is** Anything not changed in the expired collective bargaining agreement between the parties shall remain as is and in effect for the duration of this Agreement.

RELEVANT PORTION OF THE BOROUGH CODE

Chapter 91, 53 P.S. Section 46121

Borough council may, subject to the civil service provisions of this act, if they be in effect at the time, appoint and remove, or suspend, or reduce in rank, one or more suitable persons, citizens of the United States of America, as borough policemen . . . .

The borough council may designate one of said policemen as chief of police. The mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties, except that council shall fix and determine the total weekly hours of employment that shall apply to the policemen.

. . . .

The borough may, by ordinance, establish a police department consisting of chief, captain, lieutenant, sergeants, or any other classification desired by the council, and council may, subject to the civil service provisions of this act, if they be in effect at the time, designate the individuals assigned to each office, but the mayor shall continue to direct the manner in which the persons assigned to the office shall perform their duties. The mayor may, however, delegate to the chief of police or other officers supervision over and instruction to subordinate officers in the manner of performing their duties. The mayor may appoint special policemen during an emergency in which the safety and welfare of the borough and the

public is endangered and auxiliary policemen may be appointed as provided by general law.

. . . .

THE DIRECTIVES (January 21, 2005)

The Duryea Borough Council has issued the following directives to [sic] which you must follow:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.

2. You are not to attend council meetings as the Chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed by your department.

4. The dayshift officer must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly report to be handed in on Monday.

5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be handed in on Monday.

6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directives which you receive from either the borough solicitor or the borough secretary should be treated as a directive of borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or borough solicitor.

7. You will submit a weekly written report to the Borough secretary on the following Monday by 1:00p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.

9. The police car is to be used for official business only. Only borough officials and passengers of officials business [sic] only are allowed in the police car.

10. The Duryea municipal building is a smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.

11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00 a.m.-3:00p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

As background: The Borough, Borough Council and the Mayor are creatures of the laws of the Commonwealth of Pennsylvania (See Chapter 91, 53 P.S. Section 46121). The Union, as the employee representative, is also a creature of the Commonwealth. Each of the above has limited powers, rights and duties.

This matter arises on the occasion of the Grievant's return to work on January 21, 2005. The circumstances surrounding that return to work and the predicate discharge are fully explored by Arbitrator J. Joseph Loewenberg in his Award (the Loewenberg Award) dated December 28, 2004 (AAA Case No. 14 390 00720 03) which is Joint Exhibit 5 in this matter. The Award returned the Grievant to his position as Chief of Police with substantial discipline and substantial back pay.

This Grievance is not a grievance about discipline as there are no allegations that the Chief of

Police has failed to follow the "Directives" authored by Borough Council and issued at the time the Grievant was returned to work. Rather, this Grievance challenges the authority of the Borough Council to issue such Directives.

There lurks in this matter and is discussed in the Loewenberg Award two 92) underlying issue: the demarcation of a line or lines establishing the Borough Council's overall fiscal authority and its authority to establish various ranks and duties for the Police Department. The second issue is the demarcation of a line or lines of the Mayor, also charged with duties and authority and specific to provide police protection to Duryea's residents and visitors and charged with the day to day operations of the Police Department.

In many municipalities there is less need for clarity as apparently is required in this Borough; and while I am not charged with exploring why such a high level clarity is needed, I cannot overlook this need for clarity either, especially as it applies to these Directives. By "*clarity*" I mean both the process by which words are authorized and the actual words used to communicate meaning.

However, based upon the exhibits and arguments submitted to me, these lines (by statute, regulation or case law) are not as clear as either the Borough Council or the Union (and Police Chief) either believes or might like to believe. But there is no question that the Borough Council (1)

". . . has the authority to hire and discharge . . ." (Joint Exhibit 5, the Loewenberg Award at 20) officers in the Police Department, consistent with the CBA, and (2) has responsibility for all fiscal matters relating to the Borough (Chapter 91, 53 P.S. Section 46121 (Joint Exhibit 7)).

It is the position of the Police that the Borough Council violated the collective bargaining agreement when on January 11, 2005, it issued a series of eleven (11) Directives to the Chief of Police, a member of the bargaining unit. The Directives ". . . changed existing, established and recognized past practices; they change the terms and conditions of my employment; . . . and apply to me and no other officer."
(Joint Exhibit 3 at 1).

Articles 1 and 18 make clear that the Borough is prohibited from discriminating against a member (of the bargaining unit) or modifying a past practice. Further, a review of each and all the Directives reveals that each and all Directives were either imposed (1) to retaliate against Chief Guarnieri on the occasion of his being returned to work after an Arbitrator overturned a wrongful termination or (2) to apply only to him. Under these conditions not ". . . not a single directive survives the contractual protections afforded by Article 1 and 18" (Police Brief at 6).

For all of the above reasons, the Union respectfully requests that the Grievance be sustained and all of the Directives be rescinded.

It is the position of the Borough that the Union did not, and cannot, demonstrate through relevant and material evidence that it violated the CBA. The Borough wishes to remind the Arbitrator, that it is not the borough that has the burden of proof in this matter Nevertheless, the Borough will explain why it did not violate the CBA. The Borough ". . . clearly articulated and established the reasons why the directives which it issued were reasonable in this case" (Borough Brief at 20).

First, it is mandated by law, and supported by case law, that the Borough and the borough alone, is responsible for the affairs of Borough. The Borough has the obligation to the taxpayers, non-taxpayer residents and visitors to maintain fiscal responsibility in the Borough and over the borough's Police Department. Thus, the Police Chief (and the Union) bears the burden ". . . of demonstrating [that] the directives violated a section of the collective bargaining agreement or were otherwise prohibited or in excess of the Borough authority (Borough Brief at 9). Guarnieri also attempts to assert that the Directives are the Borough's way of ". . . attempting to intimidate or retaliate against him for filing a grievance regarding his termination" (Ibid.).

Second, when considering all the testimony and exhibits the Union did not establish any past practices or if there were any past practices established they developed in Mr. Guarnieri's absence.

The Directives are not discriminatory but rather the Borough Council's attempt to comply with the guidance given in the "Discussion" section of the Loewenberg Award (Joint Exhibit 5 at 10-23). From the post return to work behavior of Mr. Guarnieri, the Borough concludes that it is not really what was said in the Directives but the very fact that the Directives were issued. Mr. Guarnieri just does not want to be told what to do by anyone (Borough Brief at 9).

Past practices are an ". . . accepted course of conduct characteristically repeated in response to a given set of underlying circumstances." To establish a past practice Mr. Guarnieri has to show that the conduct alleged to be a past practice "was the customary manner in which the parties addressed a given issue" (Citations omitted, Borough Brief at 10).

The testimony shows that some of the alleged past practices are consistent with the language set forth in the CBA. Other Directives relate to Borough wide procedures (the purchase order system) or applications of general rules (no smoking). Police on patrol issues have been developed to protect the citizens of the Borough (such as patrolling the Holy Rosary School during its arrival and dismissal times); having the Chief work the day-shift as he had in the past (which the Chief acknowledges); and having the Police Chief on patrol and visible to those who pay his salary, not just sitting in his office.

As to how Directives are communicated, there was nothing different about what was Guarnieri was required to do. He is to receive Memos from Borough Secretary Morreale and have her be the information collection agent for Borough Council. The only changes that process made is making explicit, including dates, for Guarnieri and for the Union. This process was specifically acknowledged in the Loewenberg Award (at 16). From Arbitrator Loewenberg's Discussion, the Borough concluded that such instructions were required to establish "standards of conduct" (Borough Brief at 12-14).

Third, the Directives were not issued to retaliate against Guarnieri. The Directives were issued based on a close study of what the Borough failed to do or did not do as well as Arbitrator Loewenberg thought it should. Mr. Guarnieri is a unique individual. His suspension for a year for insubordination and misconduct was an "extraordinary' event in the Borough's history and his mandated return to work was also extraordinary. The Directives were developed and issued solely to establish the standards of conduct required so there would be "no confusion" about the Chief's duties (Borough Brief at 15). Anyone who reads these Directives would see that the Borough was not discriminating against Mr. Guarnieri or the Union nor violating any past practice.

Fourth, although the Union claims that the Mayor, not the Borough Council has day to day responsibility for the operation of the police, that

statement is just not accurate under the law; and Arbitrator Loewenberg agreed with the Borough's understanding of the law.

Fifth, the Directives are a lawful and reasonable exercise of the Borough's management rights. It is the Borough's position that Arbitrator Loewenberg decided this issue in a prior proceeding (Loewenberg Award). The issue having been decided, the Police Department may not relitigate it before a different arbitrator (See Loewenberg Award, Borough Brief at 16, fn 4).

The Mayor has limited responsibilities under the borough code. It is the borough that is the statutory employer of the Chief of Police. It is the borough that establishes the budget and insures that it is followed. It is the Borough that has the power to hire and fire. Not only does the Borough Code support this analysis but case law supports it (See Borough Brief at 17). Since all of the Directives "implicate" financial issues, each and all fall within the Borough's rights to issue them. These duties " . . . do not rest within the province of the mayor, but rather, based upon the case law . . . , are solely and exclusively within the province of a borough council (Borough Brief at 19).

Based on all of the above, the Grievance must be denied in its entirety "[b]ecause the Union failed to carry its burden in this case and because rational, logical reasons exist for the directives . . . "
(Borough Brief at 20).

On September 12, 2005, at the end of the evidentiary Hearing, the Parties informed the Arbitrator that they would be filing post-hearing briefs which they agreed would be submitted to and interchanged by the AAA postmarked no later than October 31, 2005, a date which was modified pending settlement negotiations between the Parties. These negotiations did not result in settlement. The parties then agreed that they would submit the post-hearing briefs to the AAA no later than January 9, 2006. The Hearing and record were declared closed on January 11, 2006, the date on which the AAA transmitted the Parties' post-hearing briefs to the Arbitrator and interchanged them with the Parties.

THE ISSUES

The Parties stipulated to the Issues in this matter s follows: Whether the Duryea Borough violated the CBA and/or the Settlement Agreement, when on January 21, 2005, it issued eleven (11) Directives to Police Chief Charles Guarnieri? If so, what shall the remedy be?

THE AWARD and OPINION

Based solely upon the record, the Arbitrator finds that Duryea Borough has violated the CBA in a number of ways in issuing (not just the act of issuing some of the Directives dated January 21, 2005, to Police Chief Charles Guarnieri. The Union failed to prove the Borough violated the CBA

when it issued other of the Directives, or parts thereof. Because the Union had the initial burden of persuasion, I have chosen to analyze the context of the issuance of the Directives (issued by the borough to establish a standard of conduct) as the point of entry for this Award and then to analyze each Directive. However, after considering both the context and the Directives, I find that the remedy demanded by the Union is overly board, all for reasons more fully discussed below.

Normally, deliberative actions taken by a Borough Council are considered to be consistent with statutory law, regulation and case law. The unexpressed but major premise of this matter is that under Article 11, "STATE AND FEDERAL LAW" and pursuant to the laws of the Commonwealth, the Borough Council (1) may issue Directives to the Chief of Police pursuant to its statutory authority and case law and in furtherance of its fiscal responsibility oversight; but (2) may not issue Directives to the Chief of Police which directly or indirectly usurp or interfere with the statutory authority of the Mayor to supervise the day-to-day operations of the Police Department. In addition it may violate any provision of the CBA.

However, before my examination of the specific Directives as the Stipulated Issue required, I must find that upon the issuance of my Award, future "Directives" (or instructions of any kind associated with the statutory authority of the borough Council regarding fiscal responsibility which might be issued to the Mayor and/or to the Chief

of Police, pursuant to a lawfully enacted ordinance or other appropriate record of action), must be transmitted s any other lawfully enacted Borough business. Directives must not be issued solely in a writing by a Borough employee without referencing an action taken formally or otherwise, by an individual, some members of or a majority of the members of Borough Council) (See Salopek v. Alberts, 417 Pa. 592, 596, 209 A.2d 295, 297 (1965) and Albano v. Civ. Serv. Comm. Of Boro of McAdoo, 13 Pa.Cmwlth. 333, 320 A.2d 385, 386 (1974). Without a record of when an action is taken and some evidence of the number of Council members who voted in the affirmative, how can the Union evaluate whether an action allegedly taken by Council has been taken by Council. Without that information, the Union cannot determine accurately whether it should or it should initiate a Grievance.

Before discussing my decision, I want to observe that there is neither a scintilla of evidence that Borough Secretary Morreale, a Borough employee, has not been faithful to the instructions from various Presidents of borough Council or, from some members, a majority of the members or all the members of Borough Council, nor has she decided matters in lieu of action of Borough Council; but hereafter when writing to the Police Chief (and thus to the Union), as has been the practice in the Borough (The Loewenberg Award at 16), the Chief (and the Union) must be assured that any Directive that issued to him (or it) is an authorized, accurate, and timely Borough Council

action in an area in which the Borough Council is statutorily entitled to act or required to act (See Article 11 of the CBA). To the extent that a writing is directed to the Mayor which would apply to the bargaining unit, the same analysis applies. This process is especially important because the Chief of Police pursuant to the January 21, 2005, Directives is prohibited from attending Borough Council meetings in his capacity as Chief of Police (See discussion concerning Directive 2 below).

In any event, Directives, instructions, etc., must contain the necessary protections for all entities, persons, etc., provided for by the statutory scheme in the Commonwealth. Failure to follow these steps may likely violate the CBA, especially in the area of wages, hours, working conditions and past practices.

Now, let us look at the January 21, 2005, Directives. Rather than conclude that the Directives issues on January 21, 2005 by the Borough Secretary on behalf of the Borough Council are invalid because they were not issued in a manner on which the Chief (and/or the Union) could rely, for purposes of this arbitration each Directive shall be considered as if each had been issued by Borough Council through the proper statutory procedure and thus were issued in a valid manner.

Therefore, without making a determination of the Borough Council's legal authority (which I am not required to do to answer the Stipulated Issues), there remains the basic question under the

Stipulation of Issues of whether the Borough Council violated the CBA in issuing any one, or part of any one, of the eleven (11) Directives.

In analyzing the Union's claims, i.e., that a Directive is either discriminatory against the Union and/or one of its members or that it modified a past practice which was enjoyed by the Union or one or more of its members, one must understand both the negotiated Agreement and the Settlement Agreement (Joint Exhibits 1 and 2) as it (they) applies to the Directive.

Directive 1: Obviously the Borough Council may set hours per day and per week for any Borough employee unless those hours discriminate against the employee. I do not find that the establishment of 8 hours per day and 40 hours per week under this CBA violates any provision thereof (See Article 15). However, if that part of Directive 1 requiring express permission of Borough Council to work beyond 8 hours per day or 40 hours per week, impinges on the Mayor's duties to operate the day to day aspects of the Police Department, that prohibition must fall.

In particular, this prohibition as it is written could interfere with the pursuit of ongoing criminal activity. However, in this Borough, it would not be expected that such an occurrence would happen often, especially on the dayshift. Nevertheless, providing permission cannot be secured in advance, the Mayor may determine that the Chief is needed to perform duties when an additional of-

ficer is required and cannot be procured. Assignments, how4ever, should be made recognizing the Borough Council's fiscal responsibility. As to the final sentence of Directive 1, it is clearly beyond the authority of Borough Council, as its attorney acknowledged, and the Borough President agrees, to require that any employee must "go home" at the end of his or her shift.

Directive 2. While it may be advantageous for all citizens of the Borough to attend Borough Council meetings, if the Chief's presence is not required, then he cannot claim pay for his attendance. On the other hand, when the Chief's presence is required, he must be paid. If he chooses to attend as a private citizen, he is not attending as a required duty for which compensation is appropriate. Therefore, to the extent that the Chief of Police might be required to attend a Council meeting(s), then he must be compensated. To that limited extent the Borough Council went beyond its authority, under the CBA, to prohibit payment.

Directive 3. The requirement that department heads follow a uniform purchase system is on its face neither discriminatory nor a violation of a past practice. However, to be held personally responsible for getting all purchase orders signed, may be discriminatory, if all other department heads are not held to the same standard. Furthermore, even if the Chief and the other department heads were to be held personally responsible, it is not clear that any disciplinary action could be taken because the words "personally re-

sponsible" are not defined. This phrase requires clarification.

Directive 4. The absolute requirement contained in the first two sentences may interfere with other duties required of the dayshift officer or the Mayor's direction of the manner in which the persons assigned to the various offices (ranks) shall perform their duties. In addition, by setting forth the hours when the dayshift officer must be at the school, the Directive may not accomplish what the Borough Council intends, especially on opening or closing days, on special event days, on weather days, etc. Since the school is the only one located within the Borough and the school is located close to the major thoroughfare of the Borough, many of the Borough's children can be protected from potential accidents by the presence of police department personnel. The testimony reveals that having a police presence at the school during the students arrival and dismissal times is an important duty. It is neither discriminatory nor a violation of a past practice to have the Borough set forth the goal of having a police presence at the school but the detail of how this presence is operationalized is, again, a responsibility of the Mayor, not Borough Council. Nevertheless, the borough Council is entitled to know whether this duty is being performed. Under this Directive, however, it is not clear whether the Borough Council is concerned about arrival and dismissal times or whether it is the specific hours that must be reported. To the extent that what the Borough Council wants to have happen is unclear, this Di-

rective must be made clear so that the dayshift officer and the Mayor know what to report. Setting a date or day of the week for a report is neither discriminatory nor a violation of past practice.

Directive 5. The "specific" goal established that "you" patrol 4-5 hours per day is aspirational in the guise of an order. Under the Directive, it appears that patrolling requires use of a patrol car since the only measurement set forth is the "daily mileage log." But, in police work, patrolling can also mean patrolling by foot or patrolling by use of an alternate vehicle if undercover work is called for. While the Borough Council can set the duties of the various ranks, tit is constraining to say how daily patrol duties must be performed by the Chief. It also appears that this Directive is designed to require the Chief to be out of his office 4-5 hours per day, on patrol, which may not allow him time to perform other critical police duties without incurring overtime. Consistent with Directive 4, setting a date or day of the week to turn in the daily mileage log is neither discriminatory nor a violation of past practice.

Directive 6. Providing appropriate legal notice is met and is referenced in any communication Directive, order, etc., and that notice of the Directives validity may be confirmed by the Mayor or Chief, such Directive, orders, etc., may be issued by the Borough Secretary or by the borough solicitor as the past practice provides. When issued as above, (1) such Directive, order, etc., shall be treated as a Directive, order, etc., legally autho-

rized by Borough Council and (2) shall be followed. If there is some question about an issue covered by the CBA, the question may be grieved under the negotiated procedure set forth in Article 16, Para 1. No action taken by Borough Council discussed in this section violated the CBA. Future actions taken by Borough Council can be grieved if the Union determines that they are discriminatory or in violation of a past practice.

Directive 7. The Borough Council may require appropriate reports from time to time and/or by a specific time from its Chief of Police providing such reports relate to Borough Council's stated objective, e.g., fiscal integrity of the Police Department. While not a violation of past practice, collecting activity information about a single member of the Police Department, may be a discriminatory event, especially when it does not request or require similar information in Directives 4. And 5 from other police officers.

Directive 8. The Union failed to provide any evidence that requiring a monthly schedule for the Police Department to be provided to the Borough Secretary violates Article 1 or 18, as long as the report is provided by a date certain. However, if Borough Council requires the monthly schedule on the 1st day of the month, Borough Council creates a conflict in how this report is to be provided on days when the Chief is not scheduled to work. If such a report is to be required, it should be submitted on the last day of the month that the Chief is scheduled for work, as the Directive ap-

pears to state. How the report is to be transmitted to the Borough Secretary should not require specific direction as long as the Chief is assured that his form of transfer get to the Borough Secretary in a timely manner.

Directive 9. Directive 9 is so poorly written that it is difficult to understand. If the Directive means that only Borough employees and elected officials may use police vehicles while engaged in Borough business, the Directive should say so. However, who takes responsibility if a police officer must transport (a) a citizen or resident as a result of an accident which happened within the Borough; (b) a female whose water breaks and who does not have transportation to a medical facility; or (c) any of a number of other appropriate scenarios. Finally, based on the evidence, the morning transportation of the Chief's child to school appears to have risen to the level of a past practice since such transportation was known to the Borough and the borough did not take any action to stop it. The underlying conditions did not change just because the Chief was disciplined and not at work. In this limited area, the Chief may continue to transport his child to school using the Police vehicle, providing such transport is required to take place when he is assigned to the dayshift and the transport is before or after the hours when the dayshift officer must attend the arrival and dismissal hours of the designated school (See Directive 4). This practice applies only to this child and the school which he attends and cannot be extended to other children or another school.

Directive 10. The evidence offered reveals that since the Municipal Building was dedicated, depending on who was elected to Borough Council, from time to time the building has been designated as smoke free. Further, there is no evidence that the Police Department was excluded from any smoking designation that was placed into effect. As I said in Directive 3 (relative to the purchase order system), as long as other department heads are held responsible for their department's actions, the Chief may be held responsible for his department's action (with the understanding that "personally responsible" is defined). And as long as other departments were subject to random checks to insure that the non smoking rules are followed, the Police Department may be subject to the same checks. If either of these conditions is violated, then it would appear that the borough ahs engaged in discriminatory activity against the Chief of Police or the Police bargaining unit. However, because employees continue to smoke, the Borough Council must provide some area under cover (although not inside) in which its employees may smoke.

Directive 11. This Directive is apirational and as such, less than enforceable While Borough Council may conclude that it is desirable for its Chief of Police to only work the dayshift Monday through Friday because he will be more visible and accessible to the public, there may be operational reasons for the Chief to work other hours and/or days. Just as there was no past practice that the Chief could only be assigned to the day-

shift; so too, he may not be so constrained in scheduling of his work that his police work suffers. However, as I said in my discussion of Directive 1, unless permission is granted to work otherwise, the Chief shall work dayshift as the Borough Council believes desirable. However, if the Mayor determines there is an operational necessity to work a different shift (which must be promptly reported to Borough Council), the Chief may be so assigned but that assignment shall be of limited duration.

While these Directives were ostensibly provided to guide the Chief of Police when he was returned to duty, each shall be clarified and reissued or withdrawn within ninety (90) days from the date this Award issued in a matter not inconsistent with the above discussion.

The Arbitrator shall retain jurisdiction for a period of one hundred twenty (120) days following the date this Award issues solely for the purpose of assisting the Parties in the implementation this Award. In addition, should either Party request my assistance regarding the implementation of this Award, it shall do so in writing to the Philadelphia Labor Center of the American Arbitration Association within the one hundred twenty (120) day period.

This Grievance is granted in part and denied in part.

/s/
EDWARD A. PERELES,
Arbitrator

Issued: February 15, 2006 at
Philadelphia, PA

Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

AMERICAN ARBITRATION ASSOCIATION

* * * * * * * * * *

In the Matter of Arbitration
between

THE DURYEA BOROUGH
POLICE DEPARTMENT

- and -

BOROUGH OF DURYEA

AAA CASE NO. 14 3-0 00419
05 RVB

GRIEVANCE:
Directives of
Grievance:
IMPLEMENTATION
OF AWARD

* * * * * * * * * *

JURISDICTION, BACKGROUND and POSITIONS OF THE PARTIES

By letter dated June 9, 2006, to the American Arbitration Association (AAA), **the Borough of Duryea** (Borough) invoked its right to request the Arbitrator's assistance in implementing the Arbitrator's Award dated February 15, 2006 (Award). Following the issuance of the Award, the Borough of Duryea (the Borough) prepared revised draft Directives (REVDIR, Attached as Exhibit A) which were ap-

proved by the **Borough of Duryea Police Department** (the Union). (See Letter to the Arbitrator dated June 2, 2006, with a copy to Union Counsel)

The Borough's letter to the AAA followed a brief conference call between the parties and the Arbitrator during which the borough gave notice to the Union and the Arbitrator that it would be seeking the Arbitrator's assistance in implementing his Award.

Pursuant to the terms of the Award,

> The Arbitrator shall retain jurisdiction for a period of one hundred twenty (120) days following the date this Award issues solely for the purpose of assisting the Parties in the implementation this Award. In addition, should either Party request my assistance regarding the implementation of this Award, it shall do so in writing to the Philadelphia Labor Center of the American Arbitration Association within the one hundred twenty (120) day period.
>
> (Award at 24)

By letter dated June 12, 2006, the AAA sought comment from the Union, if it wanted, on the Borough's invoking the Arbitrator's retained jurisdiction. By letter dated June 21, 2006, the Union stated that it "...opposes the Borough's request to have (the Arbitrator) issue or revise any Police Department directives." Additionally, during the brief telephone

conference call mentioned above, the Union indicated that the REVDIR are not consistent with the Award, should not be applied as revised, and should be withdrawn.

In responding to the positions of the Parties, I have carefully reviewed my Award and the draft REVDIR. As I understood the testimony offered during the Hearing, the two (2) main reasons for the Borough issuing Directives to Chief of Police, Charles J. Guarnieri, Jr., in January, 2005 (the original Directives are set forth in the Award at 6-8) were for (a) financial reasons, e.g., to drastically reduce Police Department overtime; to control purchases; and to control use of Police vehicles, etc.; and (b) operational reasons, e.g., to provide specific instructions to the Chief of Police; to provide an increased level of safety for children attending the school in the Borough; to better understand what work was being performed; and to ensure that the no smoking ban is uniformly applied to and throughout the Municipal Building.

In analyzing the Parties' positions, I note that in the main, the Borough's REVDIR attempted to follow the guidelines in the Award (at 15-24). However, there are elements of the language of the REVDIR which appear to create additional problems, such as a lack of clarity and consistency; and some aspects of the Award are not included in the REVDIR. I added the missing aspects; and grouped, merged and clarified the REVDIR. However, I have not revised the REVDIR. I have identified the result as the Award Directives (AWDDIR), which are set forth below.

These AWDDIR implicitly reject the Union's positions set forth above.

The first number in the AWDDIR is for identification and reference. The number(s) which follow (in parenthesis) are the numbers of the REVDIR. By issuing the AWWDIR, I am issuing a final Award, with all matters involving the Directives issues January 21, 2005, resolved.

However, the issuing of the AWDDIR does not limit the Borough Council's right to direct the Borough Secretary and/or the Borough Solicitor to issue Directives to the Police Department and to its Police Officers (the term Police Officers includes the Chief of Police) and to modify and withdraw any Directive providing when issuing a Directive the substance of the Directive is consistent with the Borough's grant of authority from the legislature of the Commonwealth and not inconsistent with the Collective Bargaining Agreement (Award at 15-17) and meets the requirements set forth below.

IMPLEMENTATION OF AWARD (AWWDIR)

1 (6) Any Directive received from the Borough Secretary or the Borough Solicitor shall be treated as a Directive from Borough Council providing the Directives indicates the date upon which the Directive was passed by a majority of the Borough Council. Before issuance, however, the language of each Directive shall be approved by a designated Borough Council member. When a Directive is issued to the Police Department or to any of its Officers, a

copy of the approved Directive shall be provided to the Mayor. The Police Department shall promptly implement and follow any and all such Directives.

2 (1) Daily shifts for Police Officers shall be eight (8) hours. Absent extraordinary or emergency circumstances, Officers shall not work in excess of eight (8) hours per work day or forty (40) hours per work week. If non-emergency overtime is necessary, it must be approved in writing by the Mayor before the overtime is worked. Written documentation of emergency overtime shall also be approved by the Mayor. This documentation must be promptly provided to the Borough Secretary by the Chief of Police (Chief).

3 (11) The Chief of Police shall be assigned to the day shift (7:00 a.m. to 3:00 p.m.), Monday through Friday. If a temporary operational need arises for the Chief to deviate from the assigned day shift and work days, Borough Council shall be promptly informed in writing by the Chief and the written report shall be submitted to the Borough Secretary. The report may be augmented by the Mayor. Included in these written reports shall be an explanation of the need for the deviation and an estimated time when the Chief can resume the Chief's assigned day shift and work days.

4 (8) On the first day of each month, no later than 1:00 p.m., the Chief of Police shall deliver to the Borough Secretary a copy of the work schedules for the month for each full time Officer. In the event that the Chief is not scheduled to work on the first

day of the month, the Chief shall deliver the schedule to the Borough Secretary on his/her last working day of the prior month.

5 (4) Except in the case of an emergency or an assignment by the Mayor, the day shift Police Officer shall be present at Holy Rosary School during the arrival and dismissal times of the students. As part of the day shift Officer's normal patrol duties, the day shift Officer should endeavor to patrol near school bus stops within the Borough prior to and subsequent to school arrival and dismissal times. Except in the case of an emergency or an assignment by the Mayor, the second shift Officer shall patrol (either on foot or in a police vehicle) around Healy Playground for approximately ten (10) minutes following school dismissal.

6 (7, 5 and 9) Each Police Officer must submit to the Chief of Police a daily log describing the Officer's work activities with sufficient detail to describe the tasks accomplished while on duty, including the location at which each task was performed and the time spent in performing each task. In addition, the daily log shall estimate the distances and time spent on foot patrol as well as clearly stating the beginning and ending mileage of the patrol vehicle and/or any other vehicle used for police business. Except for emergencies, police vehicles shall only be used for police business (with the exception of the past practice set forth in the Award at 22). The Chief shall prepare a daily log like any other Officer. The daily logs shall be kept on file by the Chief and be available for the review by the Mayor during the

work week. The Chief shall deliver all the daily logs to the Borough Secretary no later than 1:00 p.m. on Monday of the work week following the completed work.

7 (3) Each Police Officer shall follow the purchase order system. This system, in use throughout the Borough, requires that purchases be pre-approved. Failure to obtain pre-approval will result in the invoice for the purchase not being paid by the Borough and become the financial responsibility of the Officer who failed to obtain pre-approval. The Chief of Police is tasked with the duty of ensuring that that purchase order system is followed in the Police Department providing every other department head is tasked with this responsibility for his/her department.

8 (2) No Police Officer shall follow the purchase order shall be paid for attending Borough Council meetings except in the following situation: if a majority of Borough Council directs an Officer, in writing, to appear at a Borough council meeting in the Officer's official capacity, the officer will receive appropriate compensation for that appearance. Any Officer, however, may attend Borough Council meetings that are open to the public as a private citizen or resident but no compensation shall be paid by the Borough to any Officer attending any Borough Council meeting as a private citizen or resident.

9 (10) The Borough of Duryea's Municipal Building has been declared a smoke free building. The Police Department is located in the Municipal

Building and is also to be smoke free. However, the Borough has the obligation to establish a reasonably sized covered smoking area along side the Municipal Building for use by Officers who wish to smoke cigarettes. Until this covered area is established, a single room shall be identified within the Police Department footprint identified which may be used as a smoking area by the on-duty full time Officer. This room must have a door that fully closes. Once the covered area is created, the smoke free declaration shall apply to the room which has been set aside as the interim smoking solution.

/s/
EDWARD A. PERELES,
Arbitrator

Issued: July 3, 2006, at
Philadelphia, PA

EXHIBIT A

TO: Chief Charles Guarnieri
CC: Mayor Keith Moss
RE: Revised Directives

The following are revised directives to be followed by you and the other members of the Police Department. These directives have been approved by a majority of Borough Council. To the extent that any of the revised directives conflict with any of the original directives which you were issued, you and the other members of the Department are to follow the revised directives. Any questions which you may have regarding the application of the directives may be directed to the Borough Secretary.

1. The daily shift for all police officers shall be eight hours per day and forty hours per week. Absent extraordinary or emergency circumstances, officers shall not work in excess of eight hours per day or forty hours per week. If overtime is necessary, it must be approved in advance by the Mayor, except in the case of emergency. Written documentation of the Mayor's approval must be provided to the Borough Secretary as soon as possible.

2. No officer shall be paid for attending a Borough Council meeting in his/her official capacity unless directed in writing to attend such meeting by a majority of Council. Officers are free to attend any Council meeting in their individual capacity, but shall not be paid for such attendee.

3. All officer must follow the purchase system. Purchases must pre-approved by the Borough prior to making them. Purchases made by an officer outside of the purchase order system will not be paid by the Borough and shall be the sole financial responsibility of the officer.

4. Except in the case of emergency, the day shift officer shall be present at the Holy Rosary School to observe the arrival and dismissal of students. The day shift officer must indicate on his/her daily log the time spent discharging this duty or indicate what emergency, if any, prevented the performance of this duty. As part of the officer's daily patrol during the school year, an officer on duty normal typical arrival and dismissal of school should endeavor to patrol near the school bus stops within the Borough. In addition, the second shift officer should patrol (whether on foot or in a police vehicle) around Healy playground for approximately ten minutes on weekdays.

5. All officers must submit a daily patrol log. This log must indicate the daily starting and ending mileage on the patrol vehicle or other vehicle used, as well as an estimate of any distances patrolled on foot.

6. Council will issue directives for the officer to the Borough Secretary and to the Borough Solicitor, and such directives shall indicate that they have been approved by a majority of Council. Any such Borough Council directives which officers receive from either the Borough Solicitor or the Bo-

rough secretary should be treated as a directive of Borough council. Accordingly, officers are required to follow any and all directives given to them by Borough Council, whether directly or indirectly, through the borough Secretary or the Borough Solicitor.

7. All officers shall compose and submit a daily report of their duties while working as a Borough Police Officer. Reports for the work week should be submitted to the Chief of Police for submission to the Borough Secretary no later than 1:00

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES J. GUARNIERI, JR.,	
Plaintiff	CIVIL ACTION — LAW
-v-	JURY TRIAL DEMANDED
DURYEA BOROUGH, et al.,	
Defendants	NO. 05-1422

AMENDED COMPLAINT

NOW comes the Plaintiff, CHARLES J. GUARNIERI, JR., by his attorney, Cynthia L. Pollick, Esquire, and files the following Complaint against Defendants and avers as follows:

PARTIES

1. Plaintiff, CHARLES J. GUARNIERI, Jr., presently resides in Luzerne County. Plaintiff GUARNIERI (hereinafter referred to as "CHIEF GUARNIERI" is the Chief of Police for Defendant, DURYEA BOROUGH (hereinafter referred to a s "SURYEA") and was deprived wages, employment opportunities, which in effect is a demotion, and his rights of free speech were infringed upon on January

21, 2005, and continuing thereafter, after being reinstated pursuant to an Arbitration Award overturning the Defendants' decision to terminate his employment as Chief of Police in 2003.

2. CHIEF GUARNIERI has been a dedicated law enforcement officer for over 20 years competently and tirelessly serving the citizens of Luzerne County. Before accepting the position of Chief of Police of Duryea in September 2000, CHIEF GURNIERI was employed with the Pittston Township Police Department for 17 years.

3. CHIEF GUARNIERI seeks redress for violations of his constitutional rights of due process, including but not limited to the fact that CHIEF GUARNIERI was never given a pre- or a post-deprivation hearing. CHIEF GUARNIERI seeks redress for violations of his First, Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983.

4. Defendant, DURYEA BOROUGH, is a Commonwealth municipality with a principal office at 315 Main Street, Duryea, Pennsylvania.

5. Defendant, DURYEA BOROUGH OF COUNCIL is part of the Commonwealth municipality of the Borough of Duryea, and operates out of 315 Main Street, Duryea, Pennsylvania.

6. Defendant, ANN DOMMES, is the President of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

7. Defendant, LOIS MORREALE, is the Borough Secretary of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

8. Defendant, Frank GROBLEWSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

9. Defendant, EDWARD ORKWIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

10. Defendant, ROBERT WEBB, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

11. Defendant, AUDREY YAGER, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

12. Defendant, JOAN ORLOSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

13. Defendant, ALFRED AKULONIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

14. At all times material hereto, Defendants, DURYEA BOROUGH OF COUNCIL, DOMMES, MORREALE, GROBLEWSKI, ORKWIS, WEBB, YAGER, ORLOSKI, AKULONIS were servants, agents, and/or employees of Defendant Borough of Dunmore, and were acting under color of state law when they engaged in official policy, custom, and decision to deprive CHIEF GUARNIERI of his right to free speech and his right not to be harmed in absence of "just cause"..

JURISDICTION

15. This suit is brought and jurisdiction lies pursuant to the 42 U.S.C. § 1983 for constitutional violations of CHIEF GUARNIERI's rights pursuant to the First, Fourth and Fourteenth Amendments.

COUNT I
VIOLATION OF CHIEF GUARNIERI'S CONSTITUTIONAL RIGHT TO DUE PROCESS PRE- AND POST-DEPRIVATION RIGHT PLAINTIFF V. DEFENDANTS

16. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through fifteen (15) above as if set forth herein at length.

17. On January 21, 2005, CHIEF GUARNIERI was reinstated pursuant to an Arbitrator's award after a long struggle with Defendants who terminated his employment in 2003.

18. Defendants vigorously opposed CHIEF GUARNIERI's return through the arbitration process.

19. Upon his return, Defendants restricted CHIEF GUARNIERI in his job duties, speech, opportunities for wages as well as disciplined in retaliation for him petitioning the government, his association with the union, and speaking out against Defendants on matters of public concern. The actions of Defendants in restricting his job duties, in essence, was a demotion.

20. Defendants provided CHIEF GUARNIERI with a list of restrictions. The laundry list of restrictions included but not limited to "you are not to attend council meetings as the chief of police . . .", "you are to go home at the end of your eight hour shift", "you must patrol 4-5 hours during your eight hour shift", "you are not to work more than eight hours per day or more than 40 hours per week unless you receive express permission from Borough Council", and must submit weekly report of ". . detailed description of your daily activities".

21. Obviously, Defendants were restricting CHIEF GUARNIERI's job performance by placing ridiculous, unprecedented, humiliating requirements on CHIEF GUARNIERI, which were not part of the CBA and violated the terms of CHIEF GUARNIERI's employment and were placed on him in retaliation for him exercising his constitutional rights.

22. CHIEF GUARNIERI's position was and is protected by the Collective Bargaining Agreement (hereinafter "CBA").

23. CHIEF GUARNIERI did nothing to cause Defendants to retaliate against him.

24. Despite the fact that CHIEF GUARNIERI could only be harmed for "just cause", Defendants still infringed on his rights of free speech, his opportunity o make a living, and restricted his engagement in other activities which were and are an employment benefit to him as well as formally disciplining him.

25. CHIEF GUARNIERI has been continually harassed by Defendants.

26. CHIEF GUARNIERI has a property interest in his position as a Chief of the Police Department

27. Defendants never gave CHIEF GUARNIERI oral or written notice why his right to free speech and opportunity to make a living was infringed, he was disciplined, and prohibited from engaging in activities which are an employment benefit to him.

28. Defendants never provided CHIEF GUARNIERI with a pre-deprivation hearing, or any post-deprivation hearing as required by law.

29. Defendants have intentionally failed to provide CHIEF GURNIERI with any hearing or notice of charges, and therefore, have deprived CHIEF GUARNIERI of his constitutional right to a pre- and post- deprivation hearings.

30. Defendant Duryea Borough was deliberately indifferent to CHIEF GUARNIERI's rights, and intentionally failed to train its employees adequately, and also failed to have policies in place prohibiting the conduct in question.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT II
FIRST AMENDMENT RETALIATION CLAIM FREEDOM OF PETITION AND SPEECH PLAINTIFF V. DEFENDANTS

31. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty (30) above as if set forth herein at length.

32. CHIEF GUARNIERI petitioned the government by filing several grievances against Defendants.

33. CHIEF GUARNIERI also engaged in speech on Police and Union matters with defendants once he was finally reinstated.

34. CHIEF GUARNIERI was retaliated for filing grievances and engaging in free speech by being criticized, denied employment opportunities, harassed, disciplined, restricted in speech as well s restricted in his ability to perform his job duties, which in essence, is a demotion.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT III
VIOLATION OF SECTION 1983 FIRING IN RETALIATION FOR CHIEF GUARNIERI'S ASSOCIATION WITH THE UNION PLAINTIFF V. DEFENDANTS

35. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty-four (34) above as if set forth herein at length.

36. CHIEF GUARNIERI was affiliated with the Fraternal Order of Police, and assisted the union in matters.

37. Defendants were fully aware of CHIEF GUARNIERI's association with the Fraternal Order of Police, and in retaliation for the same harmed him as described above.

COUNT IV

FIRST AMENDMENT RETALIATION CLAIM FREEDOM OF PETITION PLAINTIFF V. DEFENDANTS

38. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty-seven (37) above as if set forth herein at length.

39. Defendants have continued to harass Plaintiff by threaten him with discipline as a result of his lawsuit against Defendants.

40. Defendants' conduct has even risen to the level of withholding his pay unwarrantedly and illegally.

41. Defendants have singled Plaintiff out in withholding pay since other Officers have filed completed forms similarly yet they received their overtime and/or comp pay.

42. Defendants' action are done in retaliation for him filing and pursing this litigation.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to injunctive relief in the nature of an Order restricting Defendants from harassing Plaintiff, payment of wages due, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

A Jury Trial is demanded on all counts.

By: s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire
Pa. I.D. No.: 83826
Greater Pittston Professional Center
126 S. Main Street, Suite 201
Pittston, PA 18640
(570) 654-9675

Filed As Part Of The Record
In The United States District Court
For The Middle District Of Pennsylvania

WHISARD Compliance Action Report	
U.S. Department of Labor Employment Standards Administration Wage and Hour Division	
Case ID: **1468825** Local Filing Number: **2007-349-03748** WHMIS Case Number: Registration Date: **01/29/2007** Assignment Date: **02/23/2007**	Originating District: **Wilkes Barre PA District Office** Investigating District: **Wilkes Barre PA District Office** Lead Investigator:
Employer Information Trade Name: **Duryea, Borough of** Address: **315 Main Street** **Duryea, PA 18642**	Legal Name: **Police Department** EIN: : **24-6000584** County: **Luzerne** NAIC Code: **09640** No. Of Employees: **10**

Investigation Information	
Period Investigated From: **03/10/2005** To: **03/09/2007** Investigation Type: **Complaint** Investigation Tool: **Full Investigation** Compliance Status: **Agree to Comply**	BNPI: Reinvestigation: Recurring Violation: Future Compliance Agreed: Involved in AG:
Recommended Action:	
BCDS: CMP: Litigation: Civil Action: Criminal Action: Submit For Opinion:	RO/NO Review: Follow Up Investigation: Other Action: Denial of Future Certificate: BW Payment Deadline: **3/26/2007** Trailer forms attached:

CL		
Violation/ Compliance Status	**Violations**	**BWs Computed**
No Violation found for this act/ Compliance (no violations found)		

CL (Continued)		
EEs ATP	**BWs Agreed**	**CMPs***

***CMPs computed do not necessarily indicate CMPs assessed.**

FLSA		
Violation/ Compliance Status	**Violations**	**BWs Computed**
Failure to pay Overtime/Agree To comply	2	$338.53
FLSA BW Totals:	2	$338.53

FLSA (Continued)		
EEs ATP	**BWs Agreed**	**CMPs/LDs**
2	*$338.53*	
2	*$338.53*	

Unduplicated Employees Found: *2*	Unduplicated Employees Agreed: *2*
Total Amount Computed: *$338.53*	Total Amount Agreed: *$338.53*

Conclusions & Recommendations:

FLSA/OT complaint from current EE, C. Guarnieri, alleging failure to pay for all hrs. wrkd. In December, 2006. Enterp. Cov. Under sec. 3(s)(1)C) Invest. Was not expanded to entire Borough. OT viols. Cited. Provided HRG, Fact Shts. 7 & 44, Parts553 & 785, WH-134, wh-56, WH-58s, BCDS instr. Per conf. with Borough Secretary L. Morreale, fut. Compliance assured/payment of BWs by 03/26/2007.

WH1 Signature: [unreadable] Date: **03/09/2007**
Reviewed By: /s/ Date: 3/20/07

Duryea, Borough of Case ID: 1468825

NARRATIVE REPORT

Borough of Duryea
Police Department
315 Main Street
Duryea, PA 18642
(570)655-2829
FEIN:24-6000584

This investigation was initiated as the result of a complaint; see below.

COVERAGE:

Subject is the police department of a local municipality within Luzerne County. The Borough of Duryea was incorporated in 1902. The municipality is governed by a 5-member council and a mayor. The current mayor is Mr. Keith A. Moss. Council President is Alfred Akulonis, Jr. Day-to-day business is handled by the Borough Secretary, Lois Morreale, who is appointed by the Borough Council every two years.

All 10 employees of the establishment were covered on an enterprise basis under Section 39s)(1)(C) for

the entire investigative period. See Exh. C-1. Coverage was not disputed.

The period of investigation is from 03/10/2005 to 03/09/2007.

Assignment was not expanded to include the remainder of the borough of Duryea.

EXEMPTIONS:

Section 13(b)(20) was found not applicable.

In accordance with FOH 32a00(c), section 7(k) was not available to the ER, as the employees of the police department are covered by a collective bargaining agreement that requires overtime wages after 40 hours/week. See exhibit D-1.

Section 7(o) available to ER, however, the CBA limits the amount of comp time that can be carried forward to the next six months. See exhibit D-1.
No other exemptions claimed or allowed.

STATUS OF COMPLICANCE:

The current WHD intervention was scheduled upon receipt of an overtime complaint from a current EE, Charles Guarnieri, alleging that he was not paid for 14 hours in a pay period in December, 2006. See complaint information and exhibit B-1.
Prior history – none.

The investigation revealed the employer's status of compliance, as follows:

Section 6 – Minimum Wage

No Violations.

Section 7 – Overtime

2 employees were not paid time and one-half their regular rate of pay for working over 40 hours per week. These violations occurred as the result of the employer failing to include a longevity pay in the computation of overtime wages and the failure to pay for some hours worked in 2006-2007. Total of #338.53 in back wages has been computed on exhibits A-1 through A-2.

Method of back wage computation: Assessment for unpaid hours worked was made at time and a half the employees' regular rate of pay. Half-time assessment for longevity pay using the coefficient table.

Section 12 – Child Labor

No minors employed in the department within the SIP.

The complainant's allegation has been substantiated. The complainant is due $284.11 in BWs. It should be noted that the complainant was not due 14.5 hours of OT in the pay period ending 12/09/2006, as he used a vacation day in the one week. See exhibit A-3-g. He was due only 6.5 hours of OT for that pay period.

DISPOSITION:

A final conference was held by WHI with Ms. Lois Morreale, Borough Secretary, on 03/09/2007 at the establishment. All violations were discussed in detail. Lois Morreale stated that the reason the violations occurred is that the borough was not aware of the need to include the longevity pay in the OT computations. With respect to the unpaid hours, the Mayor and the Borough Council have been at odds over the number of hours worked by the employees of the Department. See exhibits D-2 through D-9. The participant was advised that to comply in the future the Borough must:

1)Pay all non-exempt employees at least the minimum wage

2)Pay all non-exempt employees at least T-1/2 for hours worked in excess of forty in a workweek, or provide compensatory time off at T-1/2 the hours for overtime hours worked.

3)Keep and maintain records as required by Part 516.

4)Comply with all applicable CL regulations.

Borough Secretary Lois Morreale agreed to fully comply in the future with all applicable provisions of the FLSA.

Publications provided and discussed: HRG, Fact Sheets 7 and 44, Parts 553 and 785, WH-134.

Form WH-56, WH-58's, and BCDS instructions were mailed to the Borough on 03/15/2007. The Borough Secretary was contacted via phone on 03/16/2007 and advised about the handling of the BW proof of pay-

ment. Ms. Morreale verbally agreed to pay the BWs on 03/26/2007.

Resolution of complaint: Complainant appears on the Form WH-56. The complainant was advised of the results of this investigation on 03/12/2007.

Recommendation:

Completed by:

Wage & Hour Investigator
03/19/2007

Supreme Court, U.S.
FILED
DEC - 6 2010
OFFICE OF THE CLERK

No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI, Jr.,
Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Can public employees sue their employers under the Petition Clause for adverse employment actions allegedly resulting from the employees' petitioning on matters of purely private concern?

PARTIES TO THE PROCEEDING

In addition to the party identified in the caption, petitioners also include Duryea Borough Council; Ann Dommes, Individually and in her Official Capacity as Council President; Lois Morreale, Individually and in her Official Capacity as Borough Secretary; Frank Groblewski, Individually and in his Official Capacity as Councilman; Edward Orkwis, Individually and in his Official Capacity as Councilman; Robert Webb, Individually and in his Official Capacity as Councilman; Audrey Yager, Individually and in her Official Capacity as Councilwoman; Joan Orloski, Individually and in her Official Capacity as Councilwoman; and Alfred Akulonis, Individually and in his Official Capacity as Councilman.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is available at 364 F. App'x 749. The district court's memorandum and order granting in part and denying in part petitioners' motion for summary judgment, Pet. App. 55a-95a, is reported at 2007 WL 4085563. The district court's memorandum and order denying petitioners' motion for a new trial and judgment as a matter of law, Pet. App. 16a-54a, is available at 2008 WL 4132035.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2010. Petitioners timely filed a petition for rehearing and rehearing en banc, which was denied on March 4, 2010. Pet. App. 97a-98a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

This case concerns whether public employees may sue their employers under the Petition Clause of the First Amendment, U.S. Const. amend. I, cl. 6, for adverse employment actions resulting from the

employees' having petitioned on matters of purely private concern. The Third Circuit, alone among the federal circuits, has held that they can. See, *e.g.*, Pet. App. 8a; *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *Hill* v. *Borough of Kutztown*, 455 F.3d 225, 242 n.24 (3d. Cir. 2006); *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 442-443 (3d Cir. 1994).

The Third Circuit's decision is wrong for two reasons. First, public employees' similar *speech-based* claims are not actionable unless their speech concerns a matter of public interest, *Connick* v. *Myers*, 461 U.S. 138, 147 (1983), and this Court's precedents make clear that the Petition Clause affords no "greater constitutional protection" than the Speech Clause and should be subject to the same modes of constitutional analysis. *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). Second, this Court has long recognized that government entities have "far broader" powers when acting as an employer rather than as a sovereign, *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)), and that governmental employers accordingly "enjoy wide latitude" in addressing employment disputes that "cannot be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at 599-600 (quoting *Connick*, 461 U.S. at 146). Allowing adverse employment action claims involving matters of purely private concern to be litigated in federal court—whether they implicate the Petition Clause or the Free Speech Clause—would dramatically increase judicial supervision of garden-variety workplace disputes, disrupt the

effective operation of government, and displace state and local governments' own carefully crafted protections.

A. Constitutional Background

The First Amendment guarantees "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. amend. I, cl. 6. This Court has noted that this "[c]lause * * * was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). Recognizing that "[t]hese First Amendment rights are inseparable," it has held that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Ibid.*

In *Connick* v. *Myers*, 461 U.S. 138, 147 (1983), this Court held that the First Amendment's Free Speech Clause does not protect a public employee from adverse employment action taken because of her speech on a matter not of public concern. Resting on "the common sense realization that government offices could not function if every employment decision became a constitutional matter," *id.* at 143, this Court held that when a public employee speaks "upon matters only of personal interest * * * a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior," *id.* at 147.

In *San Filippo* v. *Bongiovanni*, the Third Circuit refused to apply *Connick*'s public concern requirement to Petition Clause cases. 30 F.3d at 443-444. Rejecting the uniform view of all other circuits that had considered the issue, the *San Filippo* majority distinguished petition claims from free speech claims. "When one files a 'petition,'" the majority held, "one is not appealing over government's head to the general citizenry: when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." *Id.* at 442. To disallow a claim for adverse employment action because the petitioning that led to it addressed purely private concerns, the majority asserted, would make "the petition clause * * * a trap for the unwary—and a dead letter." *Ibid.*

Judge Becker dissented vigorously on this point. He observed "that a public employee plaintiff who has 'petitioned' is in no better position than one who has merely exercised free speech." *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting). The majority's position, he concluded, defied "the inexorable logic of *McDonald* v. *Smith*," invited "wary [public employees] to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined[, and] would undermine the government's special role as an employer." *Ibid.*

The ten other federal circuits, as well as the four state supreme courts, that have addressed this question, have uniformly held that claims like respondent's are not cognizable. *Tang* v. *R.I. Dep't of*

Elderly Affairs, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1058-1059 (2d Cir. 1993); *Andrew* v. *Clark*, 561 F.3d 261, 269 (4th Cir. 2009); *Rathjen* v. *Litchfield*, 878 F.2d 836, 841-842 (5th Cir. 1989); *Jenkins* v. *Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008); *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988); *Gunter* v. *Morrison*, 497 F.3d 868, 872 (8th Cir. 2007); *Rendish* v. *City of Tacoma*, 123 F.3d 1216, 1220-1221, 1222 (9th Cir. 1997); *Martin* v. *City of Del City*, 179 F.3d 882, 887-889 (10th Cir. 1999); *D'Angelo* v. *Sch. Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007); *Pratt* v. *Ottum*, 761 A.2d 313, 321 (Me. 2000); *Harris* v. *Miss. Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell* v. *Napolitano*, 895 P.2d 218, 225-226 (N.M. 1995); *Smith* v. *Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000).

B. Factual Background

1. The Borough of Duryea (the "Borough" or "Duryea") is a small municipality in northeastern Pennsylvania with a population of approximately 4,634. See U.S. Census Bureau, American FactFinder, http://factfinder.census.gov (2000 figures; last accessed November 29, 2010). The Borough government consists of a seven-member Borough Council (the "Council") and a mayor (the "Mayor"), all of whom are elected and serve part-time. C.A. App. A00174 & A00448. The Council is responsible for hiring and firing Borough employees, *id.* at A00175, establishing policies for the Borough government's operation, and setting its annual budget (which, in 2010, is $1.17 million, including

$12,000 for annual legal expenses, see C.A. App. A00661). The Mayor is the Borough's chief executive and supervises the chief of police in accordance with Council policies. J.A. 14; see also *id.* at 69, 71-72. The day-to-day operations of the Borough are managed by a full-time Borough manager. C.A. App. A00614-A00615.

2. In 2000, the Borough hired respondent Charles J. Guarnieri, Jr. to serve as chief of police. Pet. App. 56a. Guarnieri supervised a police force consisting of between one and three full-time officers (including himself) and approximately nine part-time officers. C.A. App. A00177-A00178. In 2002, the Borough issued three written reprimands to Guarnieri in connection with a series of budget overruns and his failure to produce a requested written statement of his job duties. J.A. 26-28. On February 7, 2003, the Council dismissed Guarnieri for disciplinary reasons. *Id.* at 14-19. He responded by filing a grievance, which led to arbitration proceedings. *Id.* at 15.

In December 2004, the arbitrator concluded that because of Guarnieri's "many" instances of misconduct, J.A. 31, including "ignor[ing] discrepancies between police schedules and police timecards, making it difficult to audit expenditures," and "display[ing] a non-cooperative attitude and a general reluctance to comply with requests and directives," *id.* at 32, "[c]ertainly his conduct deserved discipline," *id.* at 37. But because the Borough had not consistently reprimanded Guarnieri promptly to convey "its expectations and the consequences of" misconduct, *ibid.*, and because

of "procedural errors" "in initiating and completing the termination," the arbitrator concluded that the Borough lacked just cause for his termination, see generally *ibid.* ("In only three instances prior to [termination], however, was he cited promptly for violations and then formally disciplined."). The arbitrator ordered Guarnieri reinstated with back pay for the period beginning in February 2004, *id.* at 38, but he also held that the first twelve months after Guarnieri's termination should be considered an unpaid "disciplinary suspension." *Ibid.*

When Guarnieri returned to work on January 21, 2005, the Council issued eleven directives instructing him how to perform specific aspects of his job.[1] Pet. App. 57a. In response, Guarnieri filed another grievance, which proceeded to arbitration. *Id.* at 59a. On February 15, 2006, the arbitrator held that some of the directives were improper for various reasons, concluding that some were vague, infringed upon the Mayor's authority to supervise the day-to-day operations of the Police Department, or violated the Collective Bargaining Agreement with the police union. J.A. 72-79. The arbitral award ordered the Council to clarify and reissue or

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[1] The directives instructed Guarnieri, among other things, (1) not to work more than eight hours a day or forty hours per week, (2) to follow Duryea's purchase order system, (3) to personally patrol four to five hours during every shift, (4) to provide an officer for the arrival and dismissal of students at the Borough's only school, (5) to use the police car only for official business, and (6) to enforce the Borough government's no-smoking policy at the police department offices. Pet. App. 57a-59a.

rescind the directives. *Id.* at 79. The Council issued revised directives in June 2006. Pet. App. 60a.

C. District Court Proceedings

1. While the matter was pending before the arbitrator, the relationship between Guarnieri and the council grew increasingly fractious.[2] Guarnieri filed this lawsuit in July 2005, claiming that the directives and other acts of the Council constituted retaliation in violation of the Petition Clause based on his having filed and won his initial grievance. Pet. App. 4a-5a; J.A. 4. The suit named as defendants the Borough, the Borough Council, the Borough manager (individually and officially), and each of the seven members then serving on the Council (individually and officially).[3]

2. In December 2006, Guarnieri filed a request for approximately $284 in overtime.[4] The Borough denied the request because Guarnieri had not explained why the overtime was necessary. Pet.

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[2] For example, the Council directed Guarnieri not to participate in truancy and seat belt programs although they did not require expenditure of Borough funds and the Borough secretary asked Guarnieri to submit additional paperwork beyond a marriage license when he attempted to enroll his wife in the Borough's health insurance. Pet. App. 4a-5a & n.1.

[3] Only four of the defendant Council members remain in office today. See Duryea Borough Public Officials, http://www.duryeaborough.com/officials.htm (last visited November 29, 2010). The three former members remain as defendants.

[4] Although the court of appeals opinion states that the amount at issue was $338, that figure includes approximately $54 in overtime sought by another officer in a separate claim. See C.A. App. A00673, A00821.

App. 5a. An investigation by the federal Department of Labor concluded that the Borough was required to pay the overtime, though Guarnieri refused to accept the check when presented. *Ibid.*; C.A. App. A0649-A0652. Guarnieri then amended his complaint to add the denial of overtime pay as an additional retaliatory act. Pet. App. 5a.

3. The district court denied petitioners' summary judgment motion on the petition claim, concluding that "[t]he filing of a formal petition is protected without regard to whether the petition addresses a matter of public concern." Pet. App. 79a (citing *San Filippo*, 30 F.3d at 442). After trial, a jury concluded that the Council's directives and withholding of overtime were in reaction to Guarnieri's exercise of his right to petition. *Id.* at 5a-6a.[5] With respect to the directives, the jury awarded $5,000 in compensatory damages and $3,000 in punitive damages against each defendant. *Ibid.* On the overtime claim, the jury awarded $350 in compensatory damages from the Borough, plus one dollar from each individual defendant, but imposed a punitive damage award of $3,500 against each individual defendant. *Ibid.* In calculating petitioner's statutory attorney's fees under 42 U.S.C. § 1988, the district court found the lodestar to be $102,110.25, after reducing the requested sum by 91 hours because of duplication with a similar claim Guarnieri's counsel had brought previously. The district court then made a further reduction of over

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[5] The jury rejected Guarnieri's claim that the delay in extending health insurance benefits to his wife constituted retaliation. Pet. App. 5a-6a.

50 percent and awarded petitioner $45,000 in attorney's fees. *Id.* at 7a.

The district court denied the Borough's renewed motion for judgment as a matter of law and a motion for a new trial. Pet. App. 16a-43a.

D. Court of Appeals Proceedings

The court of appeals affirmed the finding of liability but vacated in part with respect to the award of damages and attorney's fees. Pet. App. 1a-15a. While acknowledging that the disputes between the parties were "often petty," *id.* at 4a, the Third Circuit rejected Duryea's argument that it should adopt the uniform position of the other courts of appeals and decline to recognize a federal cause of action where the petition concerns a matter of purely private concern, saying that it was "bound by" *San Filippo*. Pet. App. 8a.

The court vacated the award of punitive damages. The court concluded that while some of Duryea's actions were "petty and careless," they were not "malicious" or "reckless[ly] or callous[ly] indifferen[t]" to Guarnieri's rights and therefore did not warrant imposing punitive damages. Pet. App. 12a. The court also concluded that the district court had erred by reducing the award of attorney's fees to $102,110.25 and later to $45,000. The court noted that the factors the district court had considered in reducing the fee award (such as duplication of work, the difficulty of the case, and counsel's experience), were the same factors it had considered in

establishing the lodestar. It then remanded for recalculation of attorneys' fees. Pet. App. 13a-15a.[8]

The Third Circuit denied Duryea's petition for rehearing and rehearing en banc. Pet. App. 97a-98a.

SUMMARY OF ARGUMENT

I. This Court has recognized repeatedly that the Speech and Petition Clauses foster the same ideals of self-government and free expression and thus are "generally subject to the same constitutional analysis." *Wayte* v. *United States*, 470 U.S. 598, 611 n.11 (1985). This Court ruled in *McDonald* v. *Smith* that neither the text nor history of the Petition Clause affords any basis for "granting greater constitutional protection to statements made in a petition." 472 U.S. 479, 485 (1985). Because speech and petition rights are overlapping and complementary, the substantive rules that govern one apply with equal force to the other. In cases implicating both rights, this Court has not engaged in separate analysis, and, in cases implicating primarily the petition right, this Court has freely applied Speech Clause doctrines.

The Third Circuit has rejected this Court's reading of the Petition Clause in *McDonald* in favor of its own revisionist theory, which treats petitioning

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[8] On remand, respondent's counsel has requested additional fees and costs associated with the appeal of the case. These total between $27,189.81 and $34,525.31, depending on the hourly rate used, and do not include proceedings in this Court. See Fourth Aff. of Cynthia Pollick, Esq., in Support of Plaintiff Guarnieri's Motion for Attorney Fees and Costs ¶ 4. Fee proceedings are ongoing in the district court.

as a right superior to speech. Under that theory, the right to petition deserves its own freestanding constitutional doctrine because it is older than the right to speech and concerns appeals to the government rather than to the people. In essence, because England recognized a freedom to petition in the centuries before the Framers enshrined the freedom of speech, the Third Circuit believes expression in a petition warrants "special treatment" (*San Filippo*, 30 F.3d at 441), vis-à-vis other forms of expression. That conclusion misinterprets history, would require overruling this Court's holding in *McDonald* that petitioning and speech should presumptively receive the same constitutional protection, and would call into question many long-settled precedents applying speech doctrine to petition claims. In addition, respondent's proposed rule would give central importance to the difficult matter of distinguishing between "speech" and "petitions."

II.A. This Court has consistently held that government is entitled to broader discretion when acting as an employer than as sovereign, whether an employee's challenges arise under the Equal Protection Clause, the Due Process Clause, or the Free Speech Clause. The same conclusion is warranted here. Although government employees do not sacrifice their First Amendment rights by accepting public employment, they can sue under the First Amendment Speech Clause for adverse employment action only when expressing a view "as a citizen upon matters of public concern." *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). This threshold public-concern requirement springs from two

sources: government agencies' need, like any employer, to have broad discretion in responding to employees' purely work-related complaints, and the First Amendment's primary focus on fostering democratic self-governance. Neither rationale applies with less force simply because an employee chooses to state his complaint in a petition. Indeed, the principles of *Connick* apply with special force to petitions, which are likely to be more costly and disruptive than an employee's mere comments about workplace affairs. Respondent's proposed standard could transform a garden-variety public employment dispute into a federal constitutional case and thereby hamstring the operation of agencies from the FBI to the Duryea Police Department.

B. If petition claims concerning private matters are actionable but speech claims are not, public employees could (and will) easily sidestep *Connick* by characterizing their claims as arising under the Petition Clause.

Such easy evasion of *Connick* would encourage an onslaught of burdensome litigation and costly settlements and judgments. Government employers would face increased complexity and uncertainty in addressing employee complaints, creating an obvious risk that public employers will retain unproductive or disruptive employees simply to avoid crippling defense costs and judgments.

C. Applying the public concern requirement to the Petition Clause affords proper respect to existing—and effective—remedial schemes. State and federal laws, along with collective-bargaining agreements, already provide robust remedies for

public employees disciplined for filing work-related lawsuits or grievances. Many states have adopted remedies that are carefully tailored to consider the job type, employer size, reason for discipline, and other factors. Dispensing with *Connick*'s public concern requirement would impose a one-size-fits-all remedy that ignores distinctions state legislatures have recognized as important and reward employees who bypass informal grievance processes. The result would be a serious judicial intrusion upon states and localities' freedom to manage personnel matters.

ARGUMENT

I. THE THIRD CIRCUIT'S RULE VIOLATES FUNDAMENTAL PRINCIPLES OF PARITY BETWEEN SPEECH AND PETITIONS

In *McDonald* v. *Smith*, this Court rejected the claim that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), should not apply to libelous expressions contained in petitions to government. 472 U.S. 479, 485 (1985). It held that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than [to] other First Amendment expressions." *Ibid.* Because the Speech and Petition Clauses serve the same First Amendment interest and are both necessary to effectuate that interest, the Petition Clause deserves no "special First Amendment status." *Ibid.* This Court's precedents have for decades embodied parity in its treatment of the two clauses that has fostered a First Amendment jurisprudence that (1) elevates neither clause over the other, (2) applies a uniform standard to claims involving both speech and petitions, and (3) freely

cross-applies substantive doctrine between cases involving the two clauses.

Accordingly, "[a]lthough the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the *same constitutional analysis*," especially when the rights to speech and petition have not been "burdened * * * differently." *Wayte* v. *United States*, 470 U.S. 598, 611 n.11 (1985) (emphasis added). As all the federal courts of appeals and state supreme courts that have addressed the issue recognize, *McDonald*'s reasoning and holding require—or at least create a strong presumption—that the substantive standards governing the Petition and Speech Clauses closely track one another when addressing the same governmental conduct. See Pet. at 8-10. When a public employee's expression takes the form of both speech and a petition, these courts seamlessly apply the Speech Clause's public concern requirement to review adverse employment action claims under the Petition Clause. *Ibid.*

The Third Circuit and respondent, however, deny the clauses' fundamental parity. Distorting *McDonald*, they maintain that the Petition Clause gives disgruntled public employees a cause of action for adverse employment actions taken in response to expression implicating matters of purely private concern—an argument this Court has specifically rejected for the neighboring Speech Clause. See *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). To do so, they adopt a revisionist history of the Petition Clause that *McDonald* firmly rejected.

A. *McDonald* Recognized That The Original Understanding Of The Petition Clause Cannot Support A Hierarchy Of First Amendment Rights

The right to petition initially emerged in England not as a guarantor of autonomy or accountability but as a mechanism for reinforcing the Crown's authority over its subjects. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2163-2165 (1998). For example, although Magna Carta protected the barons' right to petition, it also conditioned formal action on petitions upon the barons' allegiance to the Crown. *Ibid.* Likewise, the Crown and Parliament could dismiss a petition whose language was disrespectful of their authority without any consideration at all. *Id.* at 2170. In the seventeenth century, as Parliament more readily asserted its authority, petitioning became a means of controlling the Crown itself. Parliament began to condition allocation of funds to the King upon his considering the petitions it forwarded. *Id.* at 2167-2168. The need to quell civil unrest gave the Crown further incentive to act on petitions. Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. Rev. 739, 751-752 (1999). What began as a means through which the sovereign maintained its authority thus evolved into a principal mechanism for a "wide[] spectrum of society" to "participat[e] in English political life." Mark, *supra*, at 2169-2170. The resulting "web of mutual obligation" helped legitimize the authority of the Crown and the Parliament by providing the English people a potent means of political participation. *Ibid.*

To promote and protect popular sovereignty in America, our Constitution guarantees not only the right to petition, but also the rights to speak, maintain a free press, and peaceably assemble. Although its first draft separated the right to petition from the freedoms of speech and press, see 1 Annals of Cong. 434 (June 8, 1789) (Joseph Gales ed., 1834) (James Madison) (separating the right to "apply[] to the Legislature by petitions" from the freedoms of speech and press), the First Amendment as ratified consolidated all three of these protections, along with the right to peaceably assemble.

The Petition Clause was thus "cut from the same cloth" as these companion clauses, *McDonald*, 472 U.S. at 482, and shares their central aim: fostering democratic self-government, *id.* at 483 ("[T]he values in the right of petition as an important aspect of self-government are beyond question."). The right to petition serves an important expressive function as one of the primary "ways [the people] may communicate their will" to the government. 1 Annals of Cong. 738 (Aug. 15, 1789) (Joseph Gales ed., 1834) (James Madison); accord *Cook* v. *Gralike*, 531 U.S. 510, 529 (2001) (Kennedy, J., concurring) (recognizing that "when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action"). As this Court has recognized, the Petition Clause and its companion First Amendment clauses addressing expression "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604 (1982). Those companion clauses, "every bit as much as the

Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self-governance." *McDonald*, 472 U.S. at 489 (Brennan, J., concurring). "[T]hough not identical, [these] are inseparable cognate rights." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

More specifically, the rights of speech and petition are both indispensible for self-government. Neither the Speech nor the Petition Clause can effectively secure democratic self-governance without the other. Take the Speech Clause. It protects at bottom the people's ability to form their own views of government. If government can punish or restrict expression, it can slow or prevent the formation of public opinions hostile to it and thus promote its own interests at the expense of the public interest. The Speech Clause thus allows for the robust exchange of views on what action is appropriate free from government interference.

The Petition Clause serves a related but somewhat different function. Although it too protects expression, it protects primarily expression from the public to the government. Once the public has, through the mechanism of free speech, framed its grievances, the right to petition ensures it can communicate those grievances to the government. *E. R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("In a representative democracy * * * government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."). The speech right thus

protects primarily the free formation of public opinion (although the debate also informs those in government of the public's views), while the petition right primarily protects the public's ability to register its opinions. Each is necessary to ensure the people's sovereignty over the government. *Stromberg* v. *California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

As a result, when expression takes the form of both speech and a petition, this Court has recognized that although the Petition Clause illuminates one dimension of the First Amendment interest, it does not demand separate analysis. In *Edwards* v. *South Carolina*, for example, this Court reversed the criminal convictions of 187 defendants, who had "peaceably assembled at the site of the State Government and there peaceably expressed their grievances 'to the citizens of South Carolina, along with the legislative Bodies of South Carolina,'" which were then in session. 372 U.S. 229, 235 & n.10 (1963). Their actions implicated the rights of assembly, free speech, and petition and, indeed, this Court held that all three expression rights were violated. *Id.* at 235 ("[I]t is clear to us that * * * South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances."). The Court, however, performed no

separate analysis under each clause. Rather, it relied exclusively on free speech precedents, *id.* at 236-238, to hold that defendants had exercised "these [three] basic constitutional rights in their most pristine and classic form," *id.* at 235.

In *United States* v. *Harriss*, 347 U.S. 612 (1954), this Court analyzed the constitutionality of the Federal Regulation of Lobbying Act. In holding that the relevant provisions did "not violate the freedoms guaranteed by the First Amendment—freedom to speak, publish and petition the Government," *id.* at 625, it similarly eschewed a clause-by-clause analysis. Rather, it applied a single uniform and holistic analysis across all three clauses to find that the Act's purpose—"maintain[ing] the integrity of a basic governmental process," *ibid.*—justified the required disclosures. *Id.* at 626.

Recognizing the Speech and Petition Clauses' deep interdependence, this Court has repeatedly applied reasoning and doctrine from precedents discussing one clause in opinions construing the other. In *Bill Johnson's Restaurants, Inc.* v. *National Labor Relations Board*, this Court noted that "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." 461 U.S. 731, 743 (1983) (citing two Speech Clause cases, *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). Similarly, when this Court considered whether the Petition Clause protects an employer who files an unsuccessful retaliatory suit against a union from an

unfair labor practice, it reasoned by analogy to familiar Speech Clause doctrines like "prior restraint," *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530 (2002) (citing *Alexander* v. *United States*, 509 U.S. 544, 553-554 (1993)), "false statements," *id.* at 530-531 (citing *Bill Johnson's Rests.*, 461 U.S. at 743), the need for "breathing space," *id.* at 531 (citing *Gertz*, 418 U.S. at 341, and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280, 285 (1964)), and the irrelevance of ill will to the question of whether regulating demonstrably false expression is constitutional, *id.* at 534 (citing *Garrison* v. *Louisiana*, 379 U.S. 64, 73-74 (1964), *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776-777 (1986), and *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 53 (1988)). Most importantly, in *McDonald* itself, when this Court considered the extent to which the Petition Clause protects false statements made in a letter to the President, it relied on *New York Times Co.* v. *Sullivan* and applied the Speech Clause's "actual malice" standard to the Petition Clause, 472 U.S. at 485.

Recognizing these clauses' parity under *McDonald*, the courts of appeals have routinely borrowed Speech Clause doctrine for use in Petition Clause cases. In *White* v. *Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000), for example, the Ninth Circuit held that petitions advocating unlawful but nonviolent activity receive the same protection that similar speech would under *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). In *Thorne* v. *Bailey*, 846 F.2d 241, 244-245 (4th Cir. 1988), the Fourth Circuit held that overbreadth analysis applies the same to statutes

touching the right to petition as to those touching on the right of free speech.

To jettison this Court's commitment to a non-hierarchical First Amendment would not only do violence to the meaning of *McDonald*, but "necessarily unsettle many [other] precedents." *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 452 (2008). As this Court has long recognized, important considerations of stare decisis counsel against overruling a principle that is "well embedded in the law." *Id.* at 451. Exempting adverse job action claims arising under the Petition Clause from *Connick*'s public concern requirement would throw into disarray all this law resting on *McDonald*'s principle of parity. Instead of harmonizing standards across the First Amendment, it would create discord.

The Third Circuit's rule reads the Petition Clause in a way that cannot be squared with history. While this Court has acknowledged that "the historical roots of the Petition Clause long antedate the Constitution," *McDonald*, 472 U.S. at 482, it has also recognized that the right to petition must be understood in light of the "ideals of liberty and democracy" present at the Founding. *Id.* at 485. Under the Third Circuit's revisionist understanding, however, the framing and ratification of the First Amendment are largely irrelevant. Insofar as the Third Circuit focused on historical precedent, it considered only what "the right to petition * * * was intended to mean in England three centuries ago," *San Filippo*, 30 F.3d at 443, at the time of the Glorious Revolution, not here at the time of our

Founding. And even then, the lesson it gleaned was idiosyncratic. Finding that the right to petition was "independent of—and substantially more ancient—than the freedoms of speech and press," it concluded that its "pedigree" entitled it to preferential status. See *id.* at 441, 443.

This view of the Petition Clause is indefensible. First, this Court has already put the Third Circuit's revisionist historical theory to rest. Foreshadowing the reasoning in *San Filippo*, the petitioner in *McDonald* insisted that the right to petition was "[u]nlike the more general freedoms of speech and press" due to its "rich and ancient history." Pet. Br. at 7-8, *McDonald* v. *Smith*, 472 U.S. 479 (1985) (No. 84-476). But drawing on Madison's view of the First Amendment, both the majority and concurrence in *McDonald* dispatched this argument without hesitation; in fact, not a single Justice supported it. See 472 U.S. at 482; *id.* at 488-490 (Brennan, J., concurring) (calling this distinction between the clauses "untenable" in light of the First Amendment's history). Since then, *McDonald*'s understanding has worked its way into the larger fabric of constitutional law, see pp.19-22, *supra*, and this Court has relied upon its analysis in other contexts, see *Dist. of Columbia* v. *Heller*, 128 S. Ct. 2783, 2790 n.5 (2008) (citing *McDonald*'s description of "the historical origins of right to petition" in discussing individual rights).

Rather than follow what this Court has identified as the proper reading of history, the Third Circuit has criticized this Court's understanding of the Petition Clause. See *Foraker* v. *Chaffinch*, 501 F.3d

231, 235-236 (3d Cir. 2007) (claiming that "the right to petition has undergone a significant transformation since its inclusion in the Bill of Rights" because this Court has "ignor[ed] the varied histories of the right to petition and the freedoms of speech, religion, and press"); cf. Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 Iowa L. Rev. 303, 345-347 (1989) (attacking this Court's conclusion that First Amendment rights should "afford comparable degrees of protection").

Second, the Third Circuit fails to understand that the fact the Petition Clause serves an independent purpose does not mean it deserves special treatment. As the Third Circuit recognizes, the Petition and Speech Clauses protect different aspects of political expression: the former safeguards primarily the right to address the government, the latter primarily the right to address the people (including speech designed to influence government policies). See *Foraker*, 501 F.3d at 237. But this unremarkable premise does not imply, much less compel, the startling conclusion that courts should prefer one form of expression over the other. If the clauses' distinctive functions actually required "separate analysis for each clause," *Foraker*, 501 F.3d at 237, surely this Court would have performed one in *McDonald* and its other related cases, see pp. 21-23, *supra*. Instead, this Court understands that while the Petition Clause guarantees "a particular freedom of expression," 472 U.S. at 482, that does not mean it deserves "special First Amendment status," *id.* at 485. Far from being constitutionally compelled, the

Third Circuit's position rests on an unsupported leap of logic.

Third, even if it were permissible to grant one right special treatment over the other, freedom of speech—not the right to petition—would be the more natural candidate. Under the Third Circuit's hierarchy of expression, "asking government to fix what * * * [it] has broken" merits more constitutional protection than "appealing over government's head to the general citizenry." *San Filippo*, 30 F.3d at 442. While this priority may accord with ancient English practice, which placed sovereignty in the Crown, it cannot be reconciled with our constitutional tradition. The older British view rests on the belief that the state—rather than the people—is the guardian of individual liberty. But as Madison noted in his report for the Virginia Resolutions of 1798, our government is "altogether different" from the British model in that "[t]he people, not the government, possess the absolute sovereignty." 4 Elliot's Debates on the Federal Constitution 569-570 (1876). For this reason, the Virginia Resolutions declared that "free communication among the people * * * has ever been justly deemed the only effectual guardian of every other right." *Id.* at 553-554. Heeding the lessons of history, this Court has recognized both that speech on public affairs is "a fundamental principle of our constitutional system," *Stromberg*, 283 U.S. at 369, and "the essence of self-government," *Garrison*, 379 U.S. at 75, and that other mechanisms serve even better than petitions to register popular opinion with government. *Minn. State Bd. For Cm'ty Colls. v. Knight*, 465 U.S. 271, 285 (1984) ("Disagreement

with public policy and disapproval of officials' responsiveness * * * is to be registered principally at the polls"). If, contrary to this Court's teachings, the Speech and Petition Clauses must have a hierarchy, speech, not petitioning, should receive more protection.

Perhaps realizing the impossibility of rehabilitating the Third Circuit's theory, respondent offers two new arguments, neither of which is convincing. First, recasting the Petition Clause as a guarantee of "access to the courts," Br. in Opp. 9, he argues that "[n]othing in *McDonald* suggested that the right of access to the courts * * * is limited to lawsuits regarding matters of public concern," *id.* at 28. But this novel understanding of the Petition Clause cannot survive a close reading of *McDonald*. While this Court has stated that "the right of access to the courts is * * * *but one* aspect of the right of petition," *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511 (1972) (emphasis added), that statement does not undermine this Court's refusal in *McDonald* to accord the Petition Clause preferential status, see 472 U.S. at 485. For, as respondent admits, *McDonald* itself cited the two cases he relies upon for his theory of "the right of access to the courts." Br. in Opp. 28; see also *McDonald*, 472 U.S. at 484 (citing *Bill Johnson's Rests.*, 461 U.S. at 741; *Cal. Motor Transp. Co.*, 404 U.S. at 513). Given that this Court drew on these precedents while simultaneously refusing to prioritize the Petition Clause, there is no reason why a "right of access to the courts" requires a different conclusion here.

Nor do rights of court access define the core of the Petition Clause or warrant special rules for lawsuits, as respondent contends. Br. in Opp. 9-10. Access to the legislature, not to the courts, was the central object of the Petition Clause's protection. Thus, as James Madison explained when he introduced what became the First Amendment, "[it is] proper to be recommended by Congress to the State Legislatures [that t]he people shall not be restrained * * * from applying *to the Legislature* by petitions, or remonstrances, for redress of their grievances." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (emphasis added); see generally Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 156 (1986) ("The express function of the * * * petition clause was to protect citizens applying to the Legislature.") (internal quotation marks omitted).

Respondent appears to recognize, moreover, that even his ahistorical vision of the Petition Clause cannot quite do the work he needs of it. He thus repeatedly supersizes his access-to-the-courts interpretation of the Petition Clause to cover everyday workplace grievances and arbitrations, which, of course, occur entirely outside the courts. See, *e.g.*, Br. in Opp. 9-10 ("Because the Third Circuit rule derives from the right of access to the courts, it is expressly limited to invocation of some 'formal mechanism for redress of grievances,' such as a lawsuit or a formal grievance and arbitration process under a collective bargaining agreement.") (citation omitted). Why he does so is clear. Without putting grievances and arbitrations at the heart of

the clause, he cannot justify even his "narrow" version of *San Filippo* or the Third Circuit's application of its rule to his own case, which concerns not just a lawsuit but grievances. But putting them there undermines his overarching claim that *Connick* should not apply to petitions because the Petition Clause offers special protection to lawsuits. Respondent cannot have it both ways. This case concerns the Petition Clause, not a more particularized right of access to the courts.

Second, respondent seeks to paint as dicta this Court's understanding of the Petition and Speech Clauses' interrelationship. He begins by recasting *McDonald*'s repeated admonitions against granting the Petition Clause special treatment as solely the product of "the specific history of libel claims." Br. in Opp. 27-28. This assertion cannot be squared with this Court's precedents. If this Court's opposition to a hierarchical First Amendment stemmed solely from the common law of libel, it is unclear why it has adopted this position in such diverse contexts as soliciting workers for union membership, *Thomas*, 323 U.S. at 530-531, and refusing to register for the Selective Service, *Wayte*, 470 U.S. at 611 n.11.

Even less convincing is respondent's suggestion that this Court's holding in *McDonald* is somehow limited to appeals "to the President." Br. in Opp. 29. Aside from suffering from the same flaws as his attempt to confine *McDonald* to libel, this theory ignores the facts of the case. The defendant in *McDonald* petitioned several congressmen and other executive branch officials in addition to the President about a key federal appointment. 472 U.S.

at 481 n.2. His actions represented core petitioning activity, not mere missive-writing to people who just happened to occupy positions in government. No more than the Third Circuit can respondent escape "the inexorable logic of *McDonald*." *San Filippo*, 30 F.3d at 449 (Becker, J., concurring and dissenting).

B. Respondent's Proposed Rule Would Give Central Importance To Unworkable Distinctions Between "Speech" and "Petitions"

In addition to unsettling many past decisions, see pp. 20-22, *supra*, prioritizing petition over speech claims threatens to burden courts and public employers with many issues about what forms of expression constitute petitions. So long as the Speech and Petition Clauses both require a showing of public concern, public employees will have little reason to argue that conduct that is more naturally considered "speech" falls within the scope of the right to petition, because it would be subject to the same standard. But if this Court exempts the Petition Clause from *Connick*'s threshold public concern requirement, much would turn on whether an employee's conduct constitutes a cognizable "petition" in addition to "speech." Courts and public employers will become enmeshed in the inquiry into whether conduct is appropriately deemed "speech" or a "petition," an inquiry that would otherwise be irrelevant. There are at least four possible ways to define a "petition" in the retaliation context, not one of which is coherent or workable.

First, this Court could decide that a public employee's right to petition should actually cover *all*

petitions. As respondent admits, "[t]his Court's decisions make clear that the Petition Clause applies to a far wider range of activities" than invoking formal mechanisms to redress grievances. Br. in Opp. 10. Indeed, this Court has held that many informal activities constitute a "petition," such as writing a letter, *McDonald*, 472 U.S. at 480-482, hiring an attorney, *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 221-222 (1967), boycotting, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913-914 (1982), and protesting, *Edwards*, 372 U.S. at 235. Such a broad interpretation would create two problems. First, it would encompass nearly everything that could reach an employer's attention. Second, it would render the Speech Clause largely irrelevant in this area. If informal forms of expression qualify as constitutionally protected "petitions," it is unclear what role would be left for the Speech Clause here, other than to create arbitrary distinctions. Protecting a public employee for writing a letter but not for circulating a questionnaire is hardly a sensible application of the First Amendment.

Second, this Court could adopt the Third Circuit's approach, which limits "petitions" to complaints that "invok[e] a mechanism for redress of grievances against the government." *San Filippo*, 30 F.3d at 439 n.18; *id.* at 442. But the purported reason for this restriction does not justify excluding informal complaints. According to the Third Circuit, this limitation is based on the assumption that appeals to the state deserve more protection than appeals to the people. See *id.* at 442. Even if this distinction were correct, which it is not, see p. 23-24, *supra*, it

would not justify excluding informal letters to public officials complaining of a wrong and asking for some remedy. The libelous letter in *McDonald* apparently would not qualify as a petition under the Third Circuit's standard. See 472 U.S. at 481.

Unsurprisingly, the experience of federal courts within the Third Circuit shows that this arbitrary distinction creates much confusion in practice. Whatever its advantages, clarity is not among them. While email complaints to government officials may not constitute a protected "petition," *Foraker*, 501 F.3d at 237-238, the following activities do: giving notice of intent to file a lawsuit, *Bradshaw* v. *Twp. of Middletown*, 296 F. Supp. 2d 526, 546 (D.N.J. 2003); see also *Anderson* v. *Davila*, 125 F.3d 148, 162 (3d Cir. 1997), consulting with an attorney, *Cipriani* v. *Lycoming County Hous. Auth.*, 177 F. Supp. 2d 303, 324 n.17 (M.D. Pa. 2001), requesting a public hearing, *Morgan* v. *Covington Twp.*, No. 3:07-cv-1972, 2009 WL 585480, at *10-11 (M.D. Pa. Mar. 6, 2009), and assisting another employee in filing a grievance, *Lohman* v. *Duryea Borough*, Civil Action No. 3:05-CV-1423, 2007 U.S. Dist. LEXIS 87720, at *32-33 (M.D. Pa. Nov. 29, 2007).

Perhaps recognizing these deficiencies, respondent offers yet a third approach—a "narrow limitation to petitions invoking some *formal* remedial mechanism," Br. in Opp. 13 (emphasis added), which he tries to root in a general "right of access to the courts," *id.* at 9. He offers no basis for drawing the line there other than it avoids some of the pitfalls of other approaches. But it suffers from an equally serious defect: its grounding principle, the

"right of access to *courts*," cannot support the reach respondent needs from it. It offers no reason why the Petition Clause should cover employment grievances leading to arbitrations, which occur entirely outside the courts, much less why it should cover grievance procedures that may never even result in arbitration.

Fourth, this Court could tether the Petition Clause to the principle respondent offers for it and recognize only lawsuits as petitions for purposes of adverse job actions. That view of petitions would not cover much of respondent's own case, of course, but it would have the virtue of fitting the theory that supposedly supports it. Its other defects, however, would clearly outweigh this single benefit. Even this seemingly limited standard would logically include less formal aspects of a lawsuit, such as announcing an intention to file a claim. See *Bradshaw*, 296 F. Supp. 2d. at 546. That would mean that a simple oral "I'll sue!"—perhaps never to be acted on—would receive more protection than more formal, written communications to government bodies seeking to invoke formal redress procedures other than a lawsuit. More importantly, this "narrow" rule would undercut many public employment dispute resolution mechanisms which rely on informal methods to avoid divisive formal disputes that can be damaging to work morale. If only those who sued—or threatened to sue—to resolve a disagreement could make out a later constitutional claim, public employees would seek initial resolution through the court system, not informal mechanisms.

Most of these approaches to the threshold inquiry of what counts as a cognizable petition will, moreover, impose substantial burdens on courts and public employers. Courts will be forced to devote scarce judicial resources to determining whether a particular employee gripe constitutes a "petition." In many situations, this will be no easy task. As experience with the Third Circuit's own standard shows, judges frequently cannot agree over this basic issue. Compare *Foraker*, 501 F.3d at 237-238 (internal email complaints are not petitions), with *id.* at 247-248 (Greenberg, J., concurring) (internal email complaints are petitions); compare *Karchnak* v. *Swatara Twp.*, No. 07-CV-1405, 2009 U.S. Dist. LEXIS 58834, at *35-36 n.11 (M.D. Pa. July 10, 2009) (supporting another employee's lawsuit is not petitioning), with *Lohman*, 2007 U.S. Dist. LEXIS 87720, at *33 (assisting another employee in filing a grievance is petitioning); compare *Perna* v. *Twp. of Montclair*, No. 05-4464 (JLL), 2006 U.S. Dist. LEXIS 70518, at *23-25 (D.N.J. Sept. 27, 2006), dismissed, 2009 U.S. Dist. LEXIS 78173 (D.N.J. Aug. 26, 2009) (having an attorney send a letter warning of possible claims is not petitioning), with *Cipriani*, 177 F. Supp. 2d at 324 n.17 (consulting with an attorney qualifies as petitioning). Others simply refuse to address a difficult issue of application. See, *e.g.*, *Snavely* v. *Arnold*, No. 1:08-cv-2165, 2009 U.S. Dist. LEXIS 51415, at *9-10 (M.D. Pa. June 18, 2009) (declining to decide whether a claim for unemployment benefits constitutes a petition).

It is unfortunate that one circuit now labors under such uncertainty; expanding the confusion to all jurisdictions would be intolerable. If this Court

exempts adverse job action claims brought under the Petition Clause from *Connick*'s public concern requirement, courts everywhere, including this one, will soon face the myriad questions of the new constitutional law of public employee frustration, which will require a sprawling "jurisprudence of minutiae," see *County of Allegheny* v. *ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment and dissenting in part), to answer.

While courts wrestle with these uncertainties, public employers will have to predict what constitutes a petition in order to manage their risk of litigation. This would add yet another level of uncertainly to making an adverse personnel decision. Answering incorrectly would either result in employer liability or deter the making of a legitimate employment decision. As set forth below, see *infra* at 51, the risk of guessing incorrectly may lead employers to avoid taking necessary adverse personnel actions, and the necessity of having to decide the question will impose costs for the lawyers who must consider it. Maintaining parity among the First Amendment's Petition and Speech Clauses, by contrast, avoids burdening both courts and public employers with unprincipled, uncertain, and unworkable standards.

II. WHERE A PUBLIC EMPLOYEE HAS PETITIONED THE GOVERNMENT ABOUT A MATTER OF PURELY PRIVATE INTEREST, ANY RESULTING ADVERSE EMPLOYMENT ACTION IS NOT SUBJECT TO FIRST AMENDMENT REVIEW

This Court has long recognized the "crucial difference * * * between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)). As this Court recently explained:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. * * * The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.

Ibid. (quoting *Waters* v. *Churchill*, 511 U.S. 661, 674-675 (1994) (plurality opinion)). Thus, "the government as employer indeed has far broader powers than does the government as sovereign," *ibid.* (quoting *Waters*, 511 U.S. at 674 (plurality opinion)), and "constitutional review of government employment decisions must rest on different principles than review of * * * restraints imposed by the government as sovereign." *Waters*, 511 U.S. at 674 (plurality opinion). This Court has consistently adhered to that bedrock principle whether an employee's claim is brought under the Equal

Protection Clause of the Fourteenth Amendment, see, *e.g.*, *Engquist*, 553 U.S. at 598, the Due Process Clauses of the Fifth and Fourteenth Amendments, see, *e.g.*, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), or the Speech Clause of the First Amendment, see, *e.g.*, *Connick* v. *Myers*, 461 U.S. 138 (1983).

The Third Circuit and respondent would have the Court disregard this crucial distinction when an employee alleges a violation of the Petition Clause of the First Amendment, arguing that a public employee's claims of adverse action in reaction to the filing of a grievance, lawsuit, or other petition should not be subject to the "public concern" requirement of *Connick* v. *Myers*, 461 U.S. at 147. That argument fundamentally misunderstands this Court's precedents. The rationales underlying *Connick* and its progeny apply with equal force to Petition Clause claims. Moreover, because public employees could easily recast informal complaints as official grievances or lawsuits, respondent's proposed standard would open an end-run around *Connick*'s public concern requirement. Adopting such a rule would "constitutionalize the employee grievance," *id.* at 154, invite unprecedented judicial involvement in routine employment decisions, dramatically increase the volume and cost of public employment litigation, and compromise the government's ability to serve the public.

A. This Court's Public Employee Speech Cases Counsel Applying *Connick* v. *Myers*'s Public Concern Requirement To Petition Clause Claims

Though "public employees do not surrender all their First Amendment rights by reason of their employment," *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006), this Court's precedents embody the "common sense realization that government offices could not function if every employment decision became a constitutional matter," *Connick*, 461 U.S. at 143. In *Engquist*, this Court identified two principles that underlie its public employment decisions:

> First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.

553 U.S. 591, 600 (2008). In *Engquist*, these principles required rejecting "class-of-one" equal protection claims in public employment. *Id.* at 594-596. Here, they require that public employee petitions address a matter of public concern before an employee will be entitled to First Amendment review of an adverse employment action.

The "basic concern" of the First Amendment is expression "relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. This special solicitude for expression on matters of public concern follows from the First Amendment's underlying goal of "assur[ing] unfettered exchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 145 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)). This understanding of the First Amendment is evident in this Court's employee speech framework, established in *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968), *Connick*, and *Garcetti*. The first part of the inquiry under that framework considers whether an employee allegedly subject to adverse job action because of expression was speaking "as a citizen upon matters of public concern." *Connick*, 461 U.S. at 147. If so, a court proceeds to so-called *Pickering* balancing, in which the full measure of the employee's interests as a citizen is weighed against the government's interests as employer. *Pickering*, 391 U.S. at 568.

Where, however, an employee was not speaking as a citizen or was speaking on matters of private concern, the adverse employment action is not subject to First Amendment review in federal court. *Connick*, 461 U.S. at 146. This rule honors the "crucial difference" between the government as sovereign and the government as employer. When an employee speaks "as a citizen," the risk that the government as sovereign may be "leverag[ing] the employment relationship," *Garcetti*, 547 U.S. at 419, to restrict speech necessitates judicial review; but "[w]hen employee expression cannot be fairly

considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices," *Engquist*, 553 U.S. at 600 (quoting *Connick*, 461 U.S. at 146). When acting as employer, the government must, like a private employer, be free to act decisively and effectively. See *Garcetti*, 547 U.S. at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for efficient provision of public services."). This Court reaffirmed this principle in *Garcetti*, warning against giving courts "a new, permanent, and intrusive role, mandating judicial oversight" of public employment, writing that "[t]his displacement of managerial discretion by judicial supervision finds no support in our precedents." *Id.* at 423.

The rationale underlying the employee speech cases applies with equal, if not greater, force to expression covered by the Petition Clause. First, as explained in Section I.A., *supra*, the Petition and Free Speech Clauses are "intimately connected both in origin and in purpose." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); accord *McDonald*, 472 U.S. at 482. The Clauses thus share the same basic First Amendment goal of "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick*, 461 U.S. at 145. It follows from this shared goal that the Petition Clause, like the Speech Clause, has as its basic concern expression "relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at

147. Because this same basic concern animates the Free Speech and Petition Clauses, it makes no sense to strike a different constitutional balance, particularly in the narrow context of public employment.[7] Accordingly, as with Free Speech Clause claims, when an employee does not petition for redress as a citizen on a matter of public concern, that employee's interests "can more readily give way to the requirements of the government as employer." *Engquist*, 553 U.S. at 600.

Second, the practical challenges of the government's role as employer are at least as substantial when an employee files a formal grievance or lawsuit as when that employee lodges

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[7] In public employment cases, this Court has typically identified the "basic concerns" of a constitutional provision at a high level of generality. See, *e.g.*, *Connick*, 461 U.S. at 147 (identifying expression on a matter "of political, social, or other concern to the community" as the primary concern of the First Amendment generally); *Engquist*, 553 U.S. at 601 (internal quotations omitted) (identifying "governmental classifications that affect some groups of citizens differently than others" as the basic concern of the Equal Protection Clause). Even if the basic concerns of the Petition Clause were drawn more narrowly, respondent points to nothing to suggest that the right to petition one's employer on purely private matters would implicate them. Indeed, the central focus of the Framers was on petitioning the *legislature*, not one's employer. See Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 156 (1986) (citing 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (quoting James Madison)). Put simply, any construction of the Petition Clause's basic concerns narrow enough to distinguish it from the Speech Clause is still nowhere near broad enough to embrace respondent's activity.

an informal complaint or simply engages in speech. Indeed, even the Third Circuit, the lone court of appeals to reject a public concern requirement, recognized that "employee lawsuits and grievances against a public employer can * * * be divisive in much the same way that employee speech can." *San Filippo*, 30 F.3d at 441. The consequences of "constitutionaliz[ing] the employee grievance," *Garcetti*, 547 U.S. at 420, are thus just as serious—if not more so—in the context of the Petition Clause.

This Court has cautioned that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. Yet that is exactly what would occur in this context in the absence of a public concern requirement. The availability of judicial review will encourage employees to fashion routine complaints as formal grievances or lawsuits. See pp. 45-47, *infra*. Grievances and lawsuits are likely to be even more disruptive and polarizing than less formal communication, whose very informality can lead to consensus or voluntary compromise. Even the most mundane workplace dispute could—and, in the Third Circuit, often *has*—become a federal case. The fear of litigation will forseeably force public officials to focus on the risk of constitutional tort liability at the expense of effectively and efficiently managing the workplace. And the demands of litigation will simultaneously distract managers from their duties. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982) ("[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits * * * to shield them from undue

interference with their duties and from potentially disabling threats of liability").

Lastly, the litigation costs of Petition Clause claims could be crippling, particularly for local governments, like the Borough, with modest budgets. Without a public concern requirement, every dispute over adverse employment action in a case in which an employee is deemed to have filed a "petition" could result in complicated, often fact-intensive litigation. At the least, numerous cases would result in some variation of *Pickering* balancing, requiring courts to weigh the interests of the employee against the government's interests as employer.[8] One of *Connick*'s underlying goals, however, was to screen out certain employment disputes without resort to such balancing, because "[t]o require *Pickering* balancing in every case where speech by a public employee is at issue * * * could compromise the proper functioning of government offices." *City of San Diego* v. *Roe*, 543 U.S. 77, 82 (2004) (per curiam).

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[8] In *Pickering*, this Court directed lower courts to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Of course, if Petition Clause retaliation claims were not subject to a threshold public concern requirement, *Pickering*'s directive to weigh an employee's "interests * * * as a citizen, in commenting on *matters of public concern*" would be nonsensical. A Petition Clause standard without a public concern requirement would presumably require some new formulation of the balance between employee and employer interests.

The Third Circuit's approach is more onerous still, because it does not even consider the government's interests as employer before allowing a claim to proceed. *See, e.g.*, *Marrero* v. *Camden County Bd. of Soc. Servs.*, 164 F. Supp. 2d 455, 468 (D.N.J. 2001). Courts in the Third Circuit thus must always undertake a fact-intensive inquiry into whether a public employer's adverse action was motivated by an employee's petition. Resolving such factbound disputes can create a significant drain on public resources. In this case, for example, respondent appears poised to collect over $100,000 in attorneys' fees from Duryea, representing over a tenth of the total Borough budget, and that sum does not even include the tens of thousands of dollars Duryea spent defending itself. See pp. 9-11 & n.6, *supra*. Simply arbitrating Guarnieri's *first grievance* cost Duryea $30,000 in legal fees—nearly three times its entire annual litigation budget—and required the Borough to dip into its capital improvement funds. C.A. App. A00661. Opening the door to lawsuits related to such grievances, and to the attorneys' fees that come with them, could impose a crippling burden on local governments.

Simply put, there is no basis for holding that the government's interests as employer are not entitled to determinative weight when an employee has petitioned about a subject of purely private interest. To the contrary, in a wide variety of contexts, see pp. 37-39, *supra*, this Court has accommodated the government's interests so long as the government is not using its power over public employees to suppress speech unrelated to its interests as an employer.

Respondent's proposed standard would ignore these similarities because of purported doctrinal distinctions between the Petition and Free Speech Clauses. But those distinctions—for example, that the Petition Clause, unlike the Speech Clause, "encompasses only activity directed to a government audience," *Foraker*, 501 F.3d at 237, or that the Clause is intrinsically concerned with access to the courts—are irrelevant here. Ultimately, the only considerations that carry weight in the public employee context are the "basic concerns of the relevant constitutional provision," *Engquist*, 553 U.S. at 600, and the government's interests as employer. As demonstrated above, these questions yield identical answers for both provisions. Accordingly, even if respondent were correct that the Free Speech and Petition Clauses differ in some respects, respondent presents no compelling reason that adverse employment action claims under the Petition Clause should not be subject to the same standard as similar Free Speech claims. Exempting employees' Petition Clause claims from the public concern requirement would be inconsistent with the principles this Court has consistently applied in the public employee context and would hobble governments' ability to serve the public.

B. Recognizing Petition Clause Claims For Adverse Job Action Taken In Response To Petitioning About Matters Of Purely Private Concern Would Permit Circumvention of *Connick*

Permitting claims under the Petition Clause to proceed even if they do not involve matters of public concern would have implications far beyond the narrow context of that clause. Because plaintiffs could easily recast other types of disputes as Petition Clause claims, circumventing *Connick*'s public concern requirement would become a simple matter, which would threaten to constitutionalize routine employment disputes and undermine the efficiency of government agencies.

In order to constitutionalize a dispute with a government employer, an employee would need merely to formalize his complaint as a petition. He could then characterize any subsequent adverse action by the employer in response to the initial dispute as retaliation for the petition. Thus, through the simple expedient of formalizing a complaint, a disagreement involving a matter of purely private concern would suddenly gain access to federal court and become entitled to full First Amendment protection. The threshold for a formal complaint to qualify as a "petition" can be quite low. While respondent suggests that only formal grievances and lawsuits would qualify as "petitions," see Br. in Opp. 9-10, he identifies no principled basis for that limitation, and, in fact, courts have held that far less significant steps suffice, see p. 31, *supra*. An employee has nothing to lose and everything to gain

by filing a petition, which essentially serves as a hedge against a judicial determination that what would otherwise be a Free Speech case involves a matter of only private concern.

It is difficult to overstate the scope of claims that employees could transform in this way. It is not just those savvy enough to immediately formalize an incipient employment dispute who could capitalize on the absence of a public concern requirement; in many such disputes the employee will already have communicated in a way that could be recast as a petition. See, *e.g.*, Br. in Opp. 1a-2a (citing to *Cicchiello* v. *Beard*, No. 3:07cv2338, 2010 WL 2891523 (M.D. Pa. July 21, 2010) (written complaint); *Clayton* v. *City of Atl. City*, Civil Action No. 09-3045 (JEI), 2010 WL 2674526 (D.N.J. June 30, 2010) (unfair labor claim to New Jersey Public Employee Relation Commission); *Karchnak* v. *Swatara Twp.*, No. 07-CV-1405, 2009 WL 2139280 (M.D. Pa. July 10, 2009) (internal affairs report); *Ravitch* v. *City of Phila.*, Civil Action No. 06-3726, 2009 WL 878631 (E.D. Pa. Mar. 31, 2009) (grievance)). In such situations, all a disgruntled employee must do is identify a sufficiently petition-like communication before he can characterize every subsequent adverse government action as taken in response to his "petitioning."

Such a result would be contrary to this Court's repeated admonitions that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976); accord *Garcetti*, 547 U.S. at 420 ("[W]hile the First

Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" (quoting *Connick*, 461 U.S. at 154)); *Connick*, 461 U.S. at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark * * * would plant the seed of a constitutional case."); see also *Engquist*, 553 U.S. at 607. This Court has declined to transform the Fourteenth Amendment into a "font of tort law," *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768 (2005); there is no warrant for making the Petition Clause a font of public employment law.

The dynamics of the employment context make it uniquely contentious and thus likely to spawn litigation. The "workplace is full of friction, discomforts, and hierarchy." *DeHart* v. *Baker Hughes Oilfield Operations*, No. Civ.A. H-04-2233, 2005 WL 3005641, at *4 (S.D. Tex. Nov. 8, 2005). Personnel decisions are "quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify," *Engquist*, 553 U.S. at 604, which can make even legitimate decisions seem arbitrary to the affected employee. As a result, "practically every employee * * * is bound to be convinced at some point that he or she is getting the short end of the stick." *Campagna* v. *Mass. Dep't of Envtl. Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002). The close daily interactions required by the workplace can aggravate the friction from an adverse employment action. In most torts, parties may interact neither before nor after the incident. But as this case illustrates, in the employment context, existing

disputes may color every subsequent interaction. See *Lauth* v. *McCollum*, 424 F.3d 631, 633 (7th Cir. 2005) (Posner, J.) ("[P]ersonal motives [cannot] be purged from all official action, especially in the frequently tense setting of labor relations."). Permitting every dissatisfied public employee alleging retaliation for a formal complaint an opportunity to seek redress in federal court will foreseeably lead to a significant increase in litigation over garden-variety disputes.

Connick's public concern requirement was designed to alleviate the burden of litigation on public employers. Allowing suits to proceed only in cases involving issues of public concern places a practical limit on the amount of litigation a public employer will confront. But if any adverse job action claim involving a petition on a matter of private concern can become a federal case, the potential for litigation will expand exponentially. Thus, allowing such private disputes into federal court through the back door—through the contrivance of filing a grievance, lawsuit, or other petition—"would open the federal floodgates to all manner of petty personnel disputes." *Altman* v. *Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984). "[G]overnments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack." *Engquist*, 553 U.S. at 608.

Contrary to respondent's claim, Br. in Opp. 19, the concern that public employees will bring petty disputes in federal court is not a hypothetical one. In the Third Circuit, district courts have had to

entertain Petition Clause claims arising out of (1) an internal affairs complaint for the recovery of unpaid towing service invoices, *Schlier* v. *Rice*, 630 F. Supp. 2d 458 (M.D. Pa. 2007); (2) a tort claim notice involving alleged dress code violations, *Marrero*, 164 F. Supp. 2d at 460; (3) a lawsuit challenging a police force suspension arising from an incident in which a policeman's ex-girlfriend wrongly accused a private security employee of having sex with her ex-boyfriend, *Morgan* v. *Covington Twp.*, No. 3:07-cv-1972, 2009 WL 585480 (M.D. Pa. Mar. 6, 2009); (4) a workmen's compensation claim for a work-related injury, *Diana* v. *Oliphant*, No. 3:05-CV-2338, 2007 WL 3491856 (M.D. Pa. Nov. 13, 2007); and (5) a municipal court criminal complaint for assault stemming from a fight outside a bar, *McGovern* v. *City of Jersey City*, No. 98-5186 (JLL), 2007 WL 2893323 (D.N.J. Sept. 28, 2007).

Although respondent claims that public employees would be unable to afford a lawyer to litigate such a case or to obtain one on a contingency basis, Br. in Opp. 19, the examples above prove otherwise. That is hardly surprising. Federal law gives lawyers an incentive to provide representation so long as a claim is cognizable under federal law. Section 1988(b) of Title 42 gives courts discretion to award attorney's fees to prevailing plaintiffs on § 1983 claims, and under such circumstances, there is essentially a presumption in favor of an award. *Unus* v. *Kane*, 565 F.3d 103, 126 (4th Cir. 2009); see also *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983). Attorney's fees are likewise available for cases settled by entry of a consent decree. *Maher* v. *Gagne*, 448 U.S. 122, 129-130 (1980). Respondent's

award is a telling indication of the powerful incentive given to trial lawyers. The jury awarded $45,358 in compensatory damages, but the district court determined the lodestar for respondent's attorney's fees to be $102,110.25. Pet. App. 5a-7a, a sum that continues to grow as this case is litigated, see note 6, *supra*.

Moreover, permitting ready circumvention of the public concern requirement would allow more such suits to survive motions to dismiss and thus to proceed to discovery. An adverse job action claim alleging First Amendment protection is a "fact-intensive inquiry" to begin with, *Thompson* v. *Dist. of Columbia*, 428 F.3d 283, 286 (D.C. Cir. 2005); see also *Suarez Corp. Indus.* v. *McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (emphasizing the particular difficulties in the public employment context), so if a case is not dismissed because it does not concern a matter of public concern, it is unlikely that a court will be able resolve it before the summary judgment stage. See *Peacock* v. *Duval*, 694 F.2d 644, 646 (9th Cir. 1982). If such a claim survives a motion to dismiss because there is no public concern requirement, a public employer may feel compelled to settle a case simply to avoid the expense and distraction of litigation. It is well established that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975).

Nationalizing the Third Circuit's rule risks over-deterrence. As this Court has recognized in the qualified immunity context, it is not only litigation itself that acts as a drag on public entities, but the mere threat of it as well. Employers considering adverse action against an employee must consider both the odds that it would precipitate a First Amendment lawsuit and the costs if such a suit is filed. Allowing plaintiffs to circumvent *Connick* increases both. Adopting such a rule thus may cause employers to opt against necessary employment actions because the risk of protracted and highly public litigation is too high to bear. Worse, the "most capable candidates * * * might be deterred from seeking" government managerial and elected positions if every employment decision carries the threat of constitutional litigation. *Wood* v. *Strickland*, 420 U.S. 308, 320 (1975). This is particularly true, as here, when the government is a small locality that must depend on the supervision of part-time elected officials. If public employers face the specter of prolonged federal litigation and constitutional liability whenever they take adverse employment action against an employee who has formalized a dispute, they would naturally respond with timidity. The public concern requirement thus serves as an important protection to prevent public employers from adopting a passive stance to avoid litigation. See *Scheuer* v. *Rhodes*, 416 U.S. 232, 241-242 (1974) ("Public officials * * * who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices.").

This Court has consistently warned against adopting rules that would commit "federal courts to a new, permanent, and intrusive role," requiring "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti*, 547 U.S. at 423. Administrative and, when appropriate, state-law remedies provide an appropriate mechanism for resolving garden-variety employment disputes. The form of the complaint—whether it be an official grievance or a casual conversation with one's supervisor—should not make a difference to the level of protection it is afforded, or to the forum that will address the allegations. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

C. Recognizing A Constitutional Claim For Adverse Employment Action Resulting From Petitioning On Matters Of Private Interest Would Displace Carefully Crafted State Remedies

In recognition of their status as equal sovereigns, the states are afforded substantial "free[dom] to regulate their labor relationships with their public employees." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007). Using that freedom, states have designed robust protections for public employees through whistleblower, labor, and civil-

service statutes—many of which contain specialized provisions that would apply here. In contrast to a one-size-fits-all cause of action under the Petition Clause, states often tailor employee rights and remedies to take into consideration the particular responsibilities of the employee and the types of conduct at issue. In addition, employer-specific collective bargaining agreements also shield public employees from adverse job action taken for seeking redress of work-related grievances. This case thus presents the question "whether an elaborate remedial system that has been constructed step-by-step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983).

The "existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights," *Bush*, 462 U.S. at 388, counsel against recognizing a constitutional right to damages for claims by public employees that adverse job action was taken against them in reaction to their having petitioned government regarding purely private matters. Injecting a new, judicial remedy into this structure would both displace careful legislative judgments and disrupt the administration of existing processes. Even coverage *gaps* in the existing web of remedies presumably reflect legislative balancing of the "numerous and complex" considerations of labor-management relations. *See Ry. Employees' Dep't* v. *Hanson*, 351 U.S. 225, 234 (1956).

Pennsylvania readily illustrates the remedies afforded by state and municipal law. Pennsylvania generally prohibits public employers from "[d]ischarging or otherwise discriminating against an employe [sic] because he has signed or filed an affidavit, petition or complaint or given any information or testimony under [the Pennsylvania Public Employe [sic] Relations Act]." 43 Pa. Stat. § 1101.1201(a)(4) (2010). Public employees alleging such actions may complain to the Pennsylvania Labor Relations Board, *id.* § 1101.1302, which has exclusive jurisdiction over such matters. *Id.* § 1101.1301. This remedial structure serves Pennsylvania's public policy of promoting "orderly and constructive relationships between all public employers and their employes [sic] subject * * * to the paramount right of the citizens of [the] Commonwealth to keep inviolate the guarantees for their health, safety and welfare." *Id.* § 1101.101.

Balancing these interests, the Pennsylvania legislature also created exceptions to the comprehensive civil-service statute. Police officers and firefighters are not covered by the general anti-retaliation statute, 43 Pa. Stat. § 1101.301 (2010), and must instead rely on general civil-service protections, union arbitration, and whatever additional safeguards may exist under their collective-bargaining agreements. See *id.* § 217. Police civil service protections in Pennsylvania are further refined based on population and department size. In Pittsburgh and Scranton, for example, officers cannot be disciplined "except for just cause which shall not be religious or political." *Id.* § 23539.1(a). In boroughs, however, police officers

cannot be fired except for reasons enumerated by the legislature. See *id.* §§ 812, 46190 (2010).[9]

For boroughs with a police force smaller than three members, the civil-service protections apply only to "regular full time police officer[s]." 53 Pa. Stat. §§ 811, 812 (2010). Officers discharged from these one- or two-person forces are entitled to a reinstatement hearing from the authority that appointed them and may appeal to the court of common pleas. *Id.* §§ 814-815. If the borough has more than two officers, civil-service protections cover *all* persons employed by the police force. *Id.* §§ 46171, 46190. In addition, the borough must create a civil-service commission to conduct reinstatement hearings upon the request of fired, suspended, or demoted officers. See *id.* §§ 46172, 46191. Appeal to the court of common pleas remains available to disciplined officers and may also be pursued by the borough. *Id.* § 46191 (2010).

Regardless of the size of the police force, however, borough officers cannot be terminated for filing a

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[9] If the borough police force has fewer than three members, reasons for discipline are limited to "(1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty." 53 Pa. Stat. § 811, 812 (2010). If the borough police force has three or more members, an additional reason for discipline is "[e]ngaging or participating in conducting of any political or election campaign otherwise than to exercise his own right of suffrage." *Id.* §§ 46171, 46190(6).

lawsuit or internal grievance because neither action is among the grounds for discipline enumerated by the legislature. See 53 Pa. Stat. §§ 812, 46190 (2010). In addition, employees protected by a just-cause standard—whether by statute or under a collective-bargaining agreement—ordinarily cannot be subject to retaliation for the mere act of filing a lawsuit or grievance because that act does not constitute "just cause" for discipline within the meaning of most employment contracts. See, *e.g.*, *Tacket* v. *Delco Remy*, 959 F.2d 650, 653-654 (7th Cir. 1992) (describing Indiana law). Deeming employees' written grievances to be "petitions" imbued with constitutional significance thus often creates no extra substantive protection for employees, it merely allows them to evade administrative procedures the legislature has carefully tailored for their circumstances and to sidestep arbitration remedies, which both state and federal law prefer as a matter of public policy. See 9 U.S.C. § 2; 43 Pa. Stat. § 217.2 (2010).

As this Court has recognized, "[t]he ingredients of industrial peace and stabilized labor-management relations * * * may well vary from age to age and from industry to industry," but "[t]he decision rests with the policy makers, not with the judiciary." *Hanson*, 351 U.S. at 234. The Pennsylvania legislature has made its decision and Guarnieri now seeks to evade its considered judgment by pursuing a judicially created federal remedy. Permitting Guarnieri to do so would replace the State's carefully tailored remedial scheme with a one-size-fits-all remedy that allows recovery even under circumstances for which the legislature has

determined that none should be available. Moreover, as experience demonstrates, see, e.g., p. 49, *supra*, dispensing with the public concern requirement for public employee petitions requires courts to serve as "general-purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system." *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004) (McConnell, J.).

Even where current remedies are not all-encompassing, "special factors" may render inappropriate any "new kind of federal litigation." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) (quoting *Bush*, 462 U.S. at 378). Among these factors are "sound principles of federalism and the separation of powers," according to which judicial intrusion into public employment should be minimal. *Garcetti*, 547 U.S. at 423. Principles of federalism apply with particular force to "the special concerns of States and localities with respect to [law enforcement personnel]" such as Guarnieri. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 n.17 (1985). Moreover, Congress's consistent judgment that states should manage relations with their own employees, see *id.* at 553, suggests that a new constitutional cause of action would be particularly inappropriate for public employees who have petitioned their employers merely about private, work-related dissatisfaction.

Federal workers likewise could invoke an expansive judicially created cause of action under the Petition Clause to circumvent the carefully

tailored remedial provisions of the Civil Service Reform Act of 1978, 5 U.S.C. § 2301 *et seq.* Congress has decided, for example, that certain remedies for workplace discipline should be off limits to most intelligence officers, certain National Guard technicians, and employees of the Tennessee Valley Authority. See 5 U.S.C. § 7511(b). In addition, Congress determined that some forms of adverse action do not warrant any judicial remedy. See, *e.g.*, *id.* § 7503(a) (suspensions of fourteen days of less); *id.* § 7511(a)(1)(A)(i) (adverse action against probationary employees). Just as the Third Circuit's approach to the Petition Clause would allow state and municipal employees to bypass finely drawn anti-retaliation statutes, it would allow many federal workers to pursue remedies that Congress has expressly withdrawn from them.

CONCLUSION

The decision below should be vacated and the case remanded for proceedings consistent with an opinion holding that public employees cannot sue their employers for retaliation under the Petition Clause unless their petitions involved matters of public concern.

Respectfully submitted.

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BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,

Petitioners,

v.

CHARLES J. GUARNIERI, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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STATEMENT OF THE CASE

This litigation concerns respondent Guarnieri's service as Police Chief of the Borough of Duryea, Pennsylvania. Defendants characterize the dispute as a small town inexplicably caught up in protracted and unwarranted litigation, a view they unsuccessfully advanced at trial. The jury verdict instead depicts a band of vindictive local officials who engaged in a protracted vendetta against Guarnieri.[1]

Duryea is a small town with only two full time police officers; the Police Chief spends a substantial portion of his time doing regular police work, rather than administration. Under the applicable borough ordinance, the seven member Borough Council has the authority to hire and fire the Police Chief; supervision of the Chief, on the other hand, is the responsibility of the Borough's Mayor.

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[1] A jury found in a separate action that the same Borough officials had dismissed another police officer, Nicholas Lohman, because he had assisted Guarnieri with his original grievance. *Lohman v. Duryea Borough*, 2008 WL 2687309 (M.D.Pa. July 1, 2008), 2007 WL 4260943 (M.D.Pa. Nov. 29, 2007).

Defendants assured the district court that both Guarnieri's judgment against the Borough itself, and his judgment "against the individual Defendants for compensatory damages ... are ... covered by insurance." Defendants' Brief in Support of Motion for Stay of Proceedings to Enforce Judgment Pending Disposition of Appeal, 6.

The relationship between the Borough and the Police Chief is governed in part by a collective bargaining agreement[2] between the Borough and the Duryea police officers, who are affiliated with the Fraternal Order of Police. The agreement governing the year 2003 was signed on behalf of the Borough by Ann Dommes, the Council President and one of the defendants in this action. The agreement states that a member of the force may be discharged only for "just cause." (P.Ex. 41 p.21). That agreement provides, in certain circumstances, for a grievance process that can lead to binding arbitration. (*Id.* at pp.19-20).

Guarnieri was initially hired in September 2000. In February 2003 the Borough Council voted to dismiss Guarnieri, an action precipitated in part when Guarnieri rejected a request from the Council Chair that he lobby the mayor to sign a proposed ordinance that was unrelated to the Police Department.[3] Two weeks after his dismissal Guarnieri filed a grievance challenging his termination.[4] The Mayor, who had no power to overturn that dismissal, nonetheless indicated his support for Guarnieri.[5] The dispute

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[2] P.Ex. 41.

[3] D.Ex. 29 (Arbitration Decision of Dec. 28, 2004), at 11.

[4] The grievance itself, and the subsequent request for arbitration, are not in the record. We have submitted a request to the Clerk, pursuant to Rule 32 of this Court, for leave to file copies of those documents.

[5] D.Ex. 29 at 17.

ultimately was referred for binding arbitration under the terms of the applicable collective bargaining agreement.

The arbitral process had many of the facets of a trial.[6] The dispute was heard by the arbitrator over several days of hearings in August and September 2004; six witnesses were examined and cross-examined and several dozen documents were put in evidence. The Borough was represented by the Borough Solicitor and two additional attorneys from Philadelphia; Guarnieri was represented by counsel provided by the Fraternal Order of Police. In December 2004 the arbitrator issued a detailed 23 page opinion which concluded that the dismissal was improper. The arbitrator ordered that Guarnieri be reinstated with partial back pay. Had the defendants taken no further action against Guarnieri following the arbitration decision, the instant litigation would never have arisen.

The Grievance-Based Retaliation

When Guarnieri returned to work, the Borough Council immediately retaliated against him for having filed the grievance and pursued the successful arbitration. The Council did so by adopting an unprecedented set of "directives" controlling the actions of the Police Chief. Some of the directives had the

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[6] Many of those formalities were required by state law. 42 Pa.Cons.Stat. §§7307-7310.

effect of limiting how much the Chief could earn; for example, it forbade Guarnieri to work or earn overtime. Others constrained the Chief's ability to do his job; the Chief was ordered, for example, to leave work and "go home" at 3 p.m. each day, an order that applied regardless of whether at that point in time the Chief might be dealing with an emergency, conducting an investigation, or making an arrest.[7] As a result of a subsequent grievance, most of these directives were overturned or modified.

In July 2005, Guarnieri commenced the instant action in federal court, alleging that the disputed directives were intended to retaliate against him for having filed the original 2003 grievance that led to ensuing arbitration and reinstatement. The complaint asserted that the retaliation violated the Petition Clause of the First Amendment. A jury found that the Borough Council had imposed the disputed directives for the purpose of retaliating against Guarnieri because he had pursued the earlier grievance and arbitration regarding his 2003 dismissal. The jury awarded Guarnieri both compensatory damages and punitive damages.

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[7] In a number of instances a directive was disputed because it provided that the Police Chief would be personally responsible for any violation of a rule by one of his subordinates, a form of strict liability which Guarnieri claimed was not imposed on other department heads. D.Ex. 18 (P.Ex. F), at 19, 23. Had those directives remained in place, it would have been easier for the Council to again dismiss Guarnieri.

The Lawsuit-Based Retaliation

While Guarnieri's federal lawsuit was pending in the district court, the Borough Council refused to pay Guarnieri for overtime hours he had worked. Guarnieri complained about the denial to the Wage and Hour Division of the United States Department of Labor, which concluded that the denial of overtime pay violated the Fair Labor Standards Act. The Borough entered into a written agreement with the Department of Labor in which it promised to pay Guarnieri $338.53 for the overtime he had worked. The Borough never paid Guarnieri that $338.53. The Borough conditioned payment of the promised amount on Guarnieri signing a waiver that would have compromised his other legal claims. Guarnieri refused to sign the waiver and proceeded with this litigation.

In December 2006 Guarnieri amended his federal complaint to add a second retaliation claim. The amended complaint alleged that the defendants' refusal to pay the overtime was a reprisal for Guarnieri's filing the original federal lawsuit. The jury sustained this second allegation of retaliation, and awarded Guarnieri $358 in compensatory damages, as well as punitive damages.

SUMMARY OF ARGUMENT

I. This case is not controlled by the holding in *McDonald v. Smith*, 472 U.S. 479 (1985), that there is no basis "for granting greater constitutional protection to statements made in a petition ... than other First Amendment expressions." 472 U.S. at 485. The complaint in this action did not allege that the retaliation against Guarnieri had occurred because of any statement in his grievance or his federal complaint; rather, the complaint asserted that he had been retaliated against "for petitioning the government." (J.App. 95). The defendants did not claim that they had acted against Guarnieri because of any such statement.

The gravamen of Guarnieri's claim was that the Borough retaliated against him to punish him for having sought redress, first by utilizing a grievance process and arbitration to get his job back, and second by filing a section 1983 action to seek damages for post-reinstatement reprisals. Defendants' argument for a narrow construction of the petition clause rests on the burdens which they assert are imposed by arbitration and litigation as such.

The legal issue in this case is thus essentially the opposite of the issue in *McDonald v. Smith*, 472 U.S. 479 (1985). In that case Smith did not dispute McDonald's petition clause right to oppose Smith's appointment to federal office; he argued only that the petition clause did not protect "intentional and reckless falsehoods" made in statements in McDonald's

letters. 472 U.S. at 484. Here the defendants do not ground their actions or objections on the content of Guarnieri's grievance or original federal complaint; they contend, rather, that Guarnieri's very act of petitioning is not protected by the Constitution.

II. The petition clause protects petitioning that deals with matters that are not of public concern. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured ... are not solely religious or political causes." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

When the petition clause was adopted, the common understanding of Americans was that the right to petition included efforts to obtain redress for private problems. The overwhelming majority of petitions received and considered by the First Congress presented private claims. Many of those petitions concerned claims for redress by current or past employees of the national government. The Clerk of this Court petitioned praying for compensation for his services and expenses. Other federal employees petitioned for wages, raises, and moving expenses. The only two private bills enacted in the first session of the First Congress were to provide compensation to former employees of the national government. Petitions to the colonial assemblies similarly dealt primarily with private matters, including petitions from then serving colonial employees. The Congress and state legislatures which approved the petition clause

assuredly understood it to protect the very types of petition with which they were most familiar.

III. The petition clause rights of public employees should not be limited to a "core" of the petition clause. The limitation on free speech claims established by *Connick v. Myers*, 461 U.S. 138 (1983) was necessary to prevent every employment decision from raising constitutional issues; almost all such employment decisions rest in part on statements made by public employees. Actions that constitute petitioning, on the other hand, are considerably less common, and can be addressed on an individual basis without the difficulties at issue in *Connick*.

IV. The core purpose of the petition clause is to enable petitioners to seek redress, not to facilitate any expression that may be incidental to those efforts. "[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). Thus even if petition clause claims of public employees were limited to the core of the petition clause, that clause would still protect petitions by public employees on matters not of public concern.

V. Guarnieri's amended complaint alleged that the defendants had retaliated against him for having filed his original section 1983 action. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress

of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). Defendants object that the redress mechanism provided by section 1983 is unduly burdensome, and complain in particular that section 1983 provides for individual liability and awards of counsel fees. But it was for Congress to decide what form of remedial mechanism to provide for violations of federal rights; the provisions of section 1983 are well within the authority of Congress under section 5 of the Fourteenth Amendment.

VI. Guarnieri's grievance, which led to the resulting arbitration proceeding, was a petition for redress of grievances. The arbitrator was empowered by the Borough to make a "final and binding" decision as to whether Duryea would restore Guarnieri to the position from which he had been dismissed. That delegation of authority to select a Borough official rendered the arbitrator a government actor for constitutional purposes. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

ARGUMENT

I. THIS CASE IS NOT CONTROLLED BY *CONNICK* AND *MCDONALD*

(1) Petitioners advance a straightforward argument. *Connick* held that statements by government employees regarding matters not of public concern are not protected by the free speech clause. *McDonald* held that a statement in a petition is not entitled to

more protection under the petition clause than the same statement would enjoy under the free speech clause. Thus, defendants reason, a public employee cannot obtain protection for a statement about an employment matter not of public concern "simply because [the] employee chooses to state his complaint in a petition." (P.Br. 13). On this view there is no need for the Court even to consider the text, historical origins or original meaning of the petition clause.

But this is not, like *McDonald*, a case about whether the petition clause protects a particular "statement" contained in a petition. The complaint in this action alleged that Guarnieri had been retaliated against "for petitioning the government." (J.App. 95; see *id.* at 97 (Guarnieri "was retaliated [against] for filing grievances"), not because he made any statement in connection with his grievance or original federal claim. The jury instructions permitted the jury to find for the plaintiff only based on retaliation for filing his 2003 grievance or his 2005 complaint, not based on retaliation for any statement in the grievance or complaint.[5] Conversely, the defendants did not claim that they had taken the assertedly retaliatory actions because of any such statement; the defendants never asserted that any statement contained in the grievance or original complaint was

[5] Tr. of April 17, 2008, at 61-62.

false, defamatory, disruptive, insubordinate, or in any other way objectionable."[9]

The factual issue that was presented at trial was whether petitioning as such – the act of requesting redress in the grievance or first federal complaint – had prompted the defendants to retaliate against Guarnieri. The trial judge explained to the jury that Guarnieri "claims that the retaliation occurred because he filed a grievance under the collective bargaining agreement .... He also claims that retaliation occurred because he filed this particular lawsuit."[10] The gravamen of Guarnieri's claim was that the defendants decided to retaliate against him because the filing of the grievance and complaint initiated an arbitration and litigation process, respectively, whose occurrence and outcome the defendants resented.

The legal issue decided by the courts below was limited to this claim. The district court held that the assertedly protected conduct in this case was the "*filing* [of] non-sham lawsuits, grievances and other petitions directed at the government or its officials. The *filing* of such a petition is protected without regard to whether the petition addresses a matter of public concern." (Pet.App. 27a) (emphasis added). Similarly, the court of appeals noted that Guarnieri's

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[9] The grievance contained only the conclusory allegation that "[t]his discharge was without just cause as required by Article 17 of the collective bargaining agreement."

[10] Tr. of April 17, 2008, at p. 59.

claim was that he had been retaliated against "for his having filed and won his 2003 grievance." (Pet.App. 5a). The defendants never argued in the lower courts, and thus those courts had no occasion to consider, whether Guarnieri might have been acted against because of some statement contained in the grievance or complaint, or in the proceedings that followed.

In this Court defendants argue that Guarnieri's efforts to obtain redress should be denied constitutional protection, not because they involved or tacitly communicated any particular statement, but because those efforts, unlike mere speech, triggered an arbitral or legal proceeding. "[P]etitions ... are likely to be more costly and disruptive than an employee's mere comments about workplace affairs." (Pet.Br. 13). The arbitration, defendants object, caused the Borough to incur litigation expenses; the lawsuit, they complain, resulted in a substantial monetary award to Guarnieri. It is only to the consequences of petitioning as such, not to any statement contained in the grievance or complaint, that the defendants direct their objections.

The constitutional argument thus advanced by the defendants in this case is essentially the opposite of the contention of the plaintiff in *McDonald v. Smith*. In *McDonald* Smith brought a libel action against an individual who had written several letters to the President opposing Smith's appointment to federal office. Smith did not challenge McDonald's constitutional right to oppose to the appointment; Smith argued only that certain statements contained

in the letters were false and malicious and thus not constitutionally protected. In the instant case, on the other hand, the defendants do not rely on or object to any statements made in the grievance or complaint to justify their actions against Guarnieri; rather, they insist that Guarnieri simply had no constitutionally protected right to file the grievance and section 1983 actions.

The particular retaliatory intent alleged (and proven) by Guarnieri is thus of controlling importance. Had Guarnieri alleged that the defendants retaliated against him because of a particular statement in the grievance or complaint, that would present a different issue. But Guarnieri asserted that it was the very act of petitioning, of seeking redress, that was the reason for the retaliatory acts. Petitioning, of course, ordinarily involves a degree of expression, but that is true of the exercise of many constitutional rights. Where that occurs the underlying constitutional right and claim remain distinct from any expression that may have occurred, incidentally or otherwise. If the Duryea Council President had demanded permission to search Guarnieri's home, and Guarnieri had responded "no" and then been fired because of that refusal, the constitutionality of that dismissal would turn on the application of the Fourth Amendment, not of the free speech clause.[11]

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[11] Similarly, if Guarnieri had been fired because he was overheard saying a prayer about an employment matter that was not of public concern, such as praying for a raise, the constitutionality of that dismissal would be governed by the free

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Perhaps such a refusal, in addition to preserving Guarnieri's privacy, could also convey some message, such as indicating to the frustrated searcher that Guarnieri believed his home was indeed his castle. But the existence of any such tacit message would not somehow eliminate Guarnieri's Fourth Amendment rights and limit him to defending his refusal under the free speech clause.

Connick is not controlling here because that decision held only that a public concern requirement applies to constitutional claims that a statement by a public employee is protected by the free speech clause.[12] *Connick* simply did not address whether a similar limitation should be imposed on public employees asserting constitutional claims under the petition clause, the free exercise clause, the establishment clause, the assembly clause, or the Fourth, Fifth or Seventh Amendments simply because the exercise of those rights also involved some form of expression.

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exercise clause, not the free speech clause. Just as petitions are not merely free speech directed to the government, prayer is not merely free speech directed to a divine being.

[12] *Connick* cannot fairly be read to hold even that all free speech claims by public employees are subject to the public concern requirement. The free speech clause includes, at least ordinarily, a right to attend a trial and related judicial proceedings. *Connick* does not hold that a public employee could be fired for having attended (during non-working hours) a trial related to employment but not involving a matter of public concern.

Defendants argue that a constitutional principle of "parity" requires that the petition clause be interpreted to provide only protections that are also found in the free speech clause; if the petition clause embodied any additional protections, they urge, there would be a "hierarchy" of constitutional rights in which the petition clause would outrank the free speech clause. (Pet.Br. 12, 14-16, 22). On this view the petition clause ought to be read so narrowly that it is entirely redundant, and merely reiterates constitutional protections that are already afforded by the free speech clause. The normal rule of construction, however, is precisely to the contrary; constitutional and statutory provisions are ordinarily interpreted so as to avoid, not achieve, such redundancy. "[I]t cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Although this Court has noted that the free speech and petition clauses may often overlap, it has never suggested that they must invariably be construed alike. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (two clauses are "not identical"); *Wayte v. United States*, 470 U.S. 598, 611 n.11 (1985) (two clauses are "generally subject to the same constitutional analysis").

In several respects the free speech clause is clearly broader than the petition clause. The free speech clause applies, as the petition clause does not, to expression (such as at least most music and dance) that has nothing to do with the government, to

expression not directed to the government at all (such as private conversations), and to expression that does not seek any form of government redress. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). Since the free speech clause is in some respects broader than the petition clause, it is impossible to understand what constitutional principle would be violated if the opposite were also true.

Petitioners rely on the statement in *Thomas* that four constitutional rights – freedom of speech, freedom of assembly, freedom of the press, and the right to petition – are "inseparable" and "cognate rights." (Pet.Br. 16-17). In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982), the Court described the right of association in the same terms. It is difficult to understand how a petitioners' proposed rule of parity could be applied to all five of these constitutional rights, in a way that assured that no single right ever provided constitutional protections unavailable under the other four. The fact that the five rights are cognate and inseparable does not mean that they all must be interpreted to have identical meaning.

(2) The practical and legal issues raised by speech and by petitioning are sufficiently different that the standard governing free speech cases should not be presumed to apply as well to petition clause claims, or vice versa.

First, the rule in *Connick* is ordinarily invoked by public employers to address and control statements that were actually made at work. Workplace remarks

implicate directly the ability of a public employer to regulate what occurs on the job.[13] *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Souter, J., dissenting) ("government needs civility in the workplace"). *Connick* enables an employer to use the threat of dismissal or other discipline to control such workplace behavior and to regulate this aspect of the workplace as it does all others.[14]

The actions at issue in petition cases, on the other hand, often if not ordinarily take place outside the workplace,[15] at agencies or institutions which the public employer does not, and in some instances constitutionally could not, control. Defendants candidly

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[13] Although *Connick* has been applied to expression outside the workplace, that has been in situations where an employer had "legitimate and substantial interests that were compromised by [the] speech." *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004); *see id.* ("speech was detrimental to [the employer]" and "harmful to the proper functioning of the police force").

[14] On the other hand, a public employer ordinarily does not care about, or even know about, statements made outside the workplace. Most employees at times complain to their friends or families about their boss; only in an Orwellian world would a public employer seek to monitor, investigate and discipline workers for such statements.

[15] In the instant case Guarnieri was not even a Borough employee when he filed the grievance that led to much of the retaliation.

explain that the burdens of petitioning to which they object are the costs and consequences of the proceedings, such as lawsuits and arbitration, proceedings which necessarily occur outside the workplace. The efforts of a public employer to control or prevent such legal processes obviously raise very different issues than steps to control workplace activities. It is one thing for the Duryea Council to regulate, through threat of discipline, statements made at the Borough Police Department; it is quite another matter for the Council to punish a Borough employee for the purpose of controlling what that employee – or his attorney – do at a federal courthouse.

Second, *Connick* protects a public employer's "broad discretion in responding to employees' purely work-related complaints." (Pet.Br. 13). Thus when an employee voices disagreement about the employer's actions, the employer needs considerable leeway in deciding whether to respond to that disagreement, to ignore it, or to discipline the employee. Permitting a public employer to punish such complaints assures that the employer can prevent internal interference with its lawful, if perhaps controversial, activities. But when a public employee seeks redress from a court or an arbitrator, the employee is asserting that an action of that employer, rather than being a matter of discretion, was unlawful, unconstitutional, or in violation of a contractual agreement, and is asking the court or arbitrator to stop or redress that action. It is, of course, inconvenient when government officials are ordered by such outside authorities to

abandon or correct a course of action found to be illegal, but that is the very essence of the rule of law. The use of disciplinary measures under *Connick* to punish workplace remarks is categorically different from the use of such measures to obstruct the due course of justice in a federal or state court or other adjudicatory body.

Third, if as defendants contend the petition clause is inapplicable to petitions on matters not of public concern, that limitation would necessarily apply to petitions filed with the United States Congress by a federal employee. The Solicitor General, in its brief supporting defendants, explains that he does so because of the interest of the United States as the nation's largest employer. (U.S.Br. 1). The Solicitor General does not, however, contend that his position advances the equally important interest of the House and Senate in receiving complaints from employees of the Executive branch. As we explain below, Congress from its very inception received and acted on petitions from current and former employees of the national government raising work-related matters that were not of public concern. Today congressional offices routinely receive and seek to redress such complaints from federal workers. Often congressional attention leads only to the resolution of an individual dispute; sometimes the pattern of such complaints, each in isolation of no seeming public import, convinces a member of the House or Senate that there is a need for legislation or congressional hearings. If the petition clause did not protect the federal workers

who write or call their Representative or Senator about a matter not of public importance, agency officials would be able to stifle such complaints.

Fourth, although the content of speech subject to *Connick* is immediately known, and the existence vel non of constitutional protection is thus foreseeable by speaker and employer alike, whether a petition will involve a matter of public concern may not be knowable when the petitioner initially seeks redress. A petition often is not, like a statement, a one-time self-defining event; a petition frequently sets in motion a process which over time involves issues which could not have been foreseen at the outset.[16] In the instant case, when Guarnieri initially filed the grievance he could not have known whether Borough officials might seek to justify his dismissal by asserting that he had engaged in some type of misconduct that would be of public concern. Conversely, at the beginning of the grievance process the defendants could not have known what factual contentions Guarnieri would advance; perhaps he could assert that he had been fired because of his race or religion.

The filing of Guarnieri's original federal complaint, which led to the lawsuit-based retaliation claim, raised a similar problem. Defendants maintain

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[16] Brief for the United States as Amicus Curiae Supporting Petitioner, *Christopher v. Harburg*, 536 U.S. 403 (2002), No. 01-394, at 20 ("The right of access to the courts is functionally a right to judicial process.").

that the original federal action (which triggered the retaliatory denial of overtime) was not a matter of public concern. On the other hand, in a development likely unforeseen at the time it was filed, that lawsuit came to highlight the circuit conflict regarding the constitutional rights of public employees under the petition clause. In its petition for certiorari defendants persuasively argued that "this case presents ... a recurring and important issue of constitutional law." (Pet. 25) (capitalization omitted). Whatever its outcome, this Court's decision in the instant case will be of national significance. In *Connick* whether Ms. Myers' own expression was of public importance could not have been affected by the subsequent litigation; but whether an individual's grievance or lawsuit is of public importance may indeed turn on later events.

The filing of a lawsuit may also implicate public concern in a manner that is unrelated to the evolving subject matter of the action. This Court has repeatedly held that trials, as well as other judicial proceedings, are inherently matters of legitimate and constitutionally protected public interest; the public and the press thus ordinarily have a First Amendment right to attend those proceedings.[17] That constitutional

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[17] *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8-13 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982). Although in this Court that issue has been considered only in the context of criminal trials, the Court has emphasized that the common law tradition of public trials

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right has never depended on a showing that the allegations in the case affected a large number of people, were against a public figure or had attracted substantial media attention. The federal trial that occurred in this action in April 2008 was in that sense necessarily a matter of public concern. The oral argument to be heard in this Court on March 21, 2011, certainly will be. It is difficult to understand how the public concern requirement could be applied to a federal or state lawsuit in which such developments were at least a possibility when it was first commenced. Whatever the solution to that question, this assuredly is not a problem raised or addressed by *Connick*.

II. THE PETITION CLAUSE PROTECTS PETITIONS THAT ARE NOT ABOUT MATTERS OF PUBLIC CONCERN

(1) The petition clause guarantees the right "to petition the Government for a redress of grievances." Nothing in the text of the petition clause in any way suggests that the availability of that constitutional protection could turn on the subject matter of the petition. To the contrary, the very structure of the petition clause is inconsistent with any such limitation.

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extended to civil as well as criminal cases. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384, 386 n.15 (1979).

The terms of the petition clause require a person invoking the constitutional guarantee to meet three, and only three, requirements. The petitioner must show that he or she sought "redress," that the request for redress was grounded on a "grievance," and that the petition was directed to "the Government." None of the elements of a petition claim is in any way concerned with or limited by the nature or importance, however assessed, of the subject matter of the petition. If a dismissed employee seeks reinstatement to his or her former job, the requested relief would be "redress" regardless of the grounds for that request. Where a government worker asserts that he or she has been treated in a manner that violates a statute, regulation, constitutional provision, contract term, or the common law, that assertion is a "grievance" regardless of whether or not members of the public happen to sympathize with or care about that type of claim.

The very specificity of the petition clause precludes adding yet a fourth element, such as a requirement that a petitioner who has been subject to reprisals also demonstrate that the petition dealt with a matter of public concern. Such an additional requirement would by its very nature exclude an entire class of meritorious grievances and wronged petitioners. Nothing in the text of the petition clause supports the surprising contention that whether an individual is protected in his or her request for redress turns on whether his claim is of interest to others, or on whether the petitioner himself is a

public figure. Under defendants' proposed standard, the grievance and lawsuit in this case would have been protected by the petition clause if they had been filed by the controversial Sheriff of Maricopa County, Arizona. Surely a lawsuit or grievance about the dismissal of the Director of the FBI would be a matter of public concern. The same petitions are no less deserving of constitutional protection if they are filed by a less well known former Police Chief of an out-of-the-way small town. The petition clause accords the right to seek redress in equal measure to every individual, no matter how obscure the nature of the grievance or how modest his or her circumstances.

The decisions of this Court have repeatedly rejected the type of distinction advocated by defendants. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured ... are not solely religious or political causes." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). In *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), the Court held that the petition clause protected the right of the union in question to provide legal assistance to its members in pursuing claims under the state workmens' compensation act, insisting that the union had the right to do so even though "[t]he litigation in question is, of course, not bound up with political matters of acute social moment." 389 U.S. at 223. In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), the majority expressly rejected the contention that the access to the courts protected by

the petition clause is limited to matters of general public importance. *Compare* 377 U.S. at 10 (Clark, J., dissenting) ("Personal injury litigation is not a form of political expression ... No guaranteed civil right is involved here") *with id.* at 8 (majority opinion) ("The right to petition the courts cannot be so handicapped."); see *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (petition clause applies to libel action).

(2) When the petition clause was adopted, the common understanding of Americans was that the right to petition included efforts to obtain redress for private problems. "[I]n post-revolutionary America, a petition to the legislature was viewed as a fundamental right and served as a means of securing redress of private grievances." Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIOST.L.J. 557, 611 (1999). "[M]any early Americans would have viewed the right to petition the legislature as including the right to present private disputes for resolution by the legislature." *Id.* at 607. "The import of [colonial era] petitioning, both for public purposes and for the redress of private claims, explains its sanctification as a 'right' in the federal Constitution." Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV.L.REV. 1381, 1487 n.520 (1998).

The records of the First Congress provide an unusually clear picture of what types of complaints the framers of the First Amendment actually understood

were the subject of petitioning. The First Congress received several hundred petitions, and was considering many of them at the same time it was framing the Bill of Rights. The members of the Congress would have been quite familiar with the contents of the petitions themselves. Every petition was read aloud on the floor of the House and the Senate, often by the Representative or Senator from whose district or state the petition had originated. In the House each petition was considered by a committee, which was usually a small ad hoc group.[18] The subject matter of those key early petitions is a compelling indication of what the framers thought petitioning was about and of the types of petitions that the Congress intended to protect. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).[19]

"[T]he overwhelming majority of First Congress petitions presented private claims." 8 Documentary History of the First Federal Congress 1789-1791

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[18] 8 Documentary History of the First Federal Congress 1789-1791 (Petition Histories and Nonlegislative Official Documents) (K. Bowling, W. DiGiacomantonio and C. Bickford, eds.) xvi-xvii (1998) (hereinafter cited as "Documentary History").

[19] Madison's initial proposal to protect the rights to petition and assembly linked the latter, but not the former, to questions of concern to the public. "The people shall not be restrained from peaceably assembling and consulting *for their common good*; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (emphasis added).

(Petition Histories and Nonlegislative Official Documents) (K. Bowling, W. DiGiacomantonio and C. Bickford, eds.) xviii (1998) (hereinafter cited as "Documentary History"); see *id.* at xvii ("[m]ost petitions dealt with local or private grievances best understood by the petitioner's own Representative."). "A petition ... during the period [1789-1795] usually dealt with the satisfaction of a private claim." Petitions, Memorials and Other Documents Submitted for the Consideration of Congress, May 4, 1789 to December 14, 1795, House Committee on Energy and Commerce, 99th Cong., 2d Sess., 1 (hereinafter cited as "Petitions, Memorials and Other Documents"). "The federal government received many petitions ... on purely private matters, especially if the records of the first few Congresses is indicative." Gregory Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2163, 2227 (1998).

A large portion of the petitions to the First Congress, probably a plurality, were from past or current employees of the national government and concerned matters related to their employment.[20] The only

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[20] Another large group of petitions sought payment for goods or services that had been provided to the Continental Army or the Confederation. 7 Documentary History 35-102. In the instant case defendants object to the application of the petition clause to petitions to government contractors. (Pet. Br. 49) (citing, as an example of a "petty dispute" to which the petition clause should not apply, a "complaint for the recovery of

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private acts adopted in the First Session of the First Congress dealt with just such claims. One awarded a Baron Glaubeck seventeen months of pay for his service as a captain in the Continental Army;[21] the other awarded six months of pay to John White, and to his clerks, for his service as a commissioner to settle the accounts between the United States and the states of Pennsylvania, Delaware and Maryland.[22] These petitions were considered and acted upon during the summer of 1789, the same time that Congress framed the Bill of Rights.

Many petitions sought compensation for previous periods of government employment; those petitions were from petitioners who had never been paid and from petitioners who asserted that their prior compensation was insufficient. Thomas Barclay petitioned for unpaid salary and expenses in connection with his service as the American vice consul and then consul in Paris.[23] William Peery sought compensation for his service in negotiating the Treaty of Hopewell with the Cherokee Nation.[24] Alexander Hanson requested payment for his service on a court of arbitration to resolve a boundary dispute between

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unpaid towing services invoices, *Schlier v. Rice*, 630 F.Supp.2d 458 (M.D.Pa. 2007)").

[21] 7 Documentary History 198-201, 6 Stat. 1.

[22] 8 Documentary History 123-26; 6 Stat. 1.

[23] 8 Documentary History 119-23. Congress ultimately reimbursed Barclay's estate in 1808. 6 Stat. 72.

[24] *Id.* at 102-03.

Georgia and South Carolina.[25] Other petitions from former civilian employees sought reimbursement for expenses.[26] Petitions were also submitted by veterans of the Continental Army.[27]

The most celebrated of these petitions for compensation was from Baron Frederick von Steuben, who had volunteered for service in the Continental Army and became General Washington's Inspector General. Von Steuben had served without pay for seven years. 8 Documentary History 212. Congress awarded von Steuben an annuity of $2500 "for the ... services ... rendered to the United States." (6 Stat. 2, ch. 16). The First Congress also received a substantial number of petitions from men who had been injured while serving in the Continental Army. 8 Documentary History 332-35. These petitions are analogous to claims for workmen's compensation, which defendants insist ought not be protected by the petition clause (Pet.Br. 49) (citing with disapproval *Diana v. Oliphant*, 2007 WL 3491856 (M.D.Pa. Nov. 13, 2007)).

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[25] 8 Documentary History 110-13. Other petitions from former civilian employees are set out at *id.* 7-34, 96-119.

[26] *Id.* 8 Documentary History 90 (petition of former steward of the household of the presidents of the confederation congress for "expenditures for marketing and for sundry expenses"), 91-92 (petition of former Commissioner of the Continental Loan Office seeking reimbursement for "firewood & candles" and the salaries of clerks in his employ), 98 (petition of William Mumford).

[27] *Id.* at 164-88.

The First Congress also received petitions from then serving federal employees. John Tucker, then the first Clerk of this Court, filed a petition "praying for compensation for his past services and expenses, as clerk to the [S]upreme [C]ourt of the United States." 8 Documentary History 189.[28] The Assistant Doorkeeper of the House of Representatives successfully petitioned for an increase in compensation. Petitions, Memorials and Other Documents 24. Roger Alden, who was responsible for keeping the records of the earlier Confederation Congress and the great seal of the federal Union, petitioned for compensation for his services and for the expenses of his office. 8 Documentary History 132-33. Winthrop Sargent, the Secretary of the Western Territory, petitioned for additional expenses. *Id.* at 134-35. The House received petitions seeking raises from the clerks in the Office of the Paymaster General and for certain "clerks in public offices" in the nation's capital. 8 Documentary History 128-30. Several clerks who had relocated from New York City to Philadelphia sought for reimbursement of their moving expenses. *Id.* at 131-32. The former postmistress of Baltimore petitioned Congress to overturn her dismissal by the Postmaster General. *Id.* at 231-39.

The petitions received by the First Congress were similar to those that had been addressed by the

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[28] The First Congress did not act on the petition. The Second Congress enacted legislation providing compensation for the Clerk. 1 Stat. 275, 276 §3.

colonial assemblies. "In the earliest colonial American governments, ... [m]ost petitions involved private disputes." Stephen Higginson, Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV.L.REV. 1111, 1117 (1993). In the colonies petitioning was "a method whereby ... individuals could seek employment of public power to redress private wrongs." Mark, 66 FORDHAML.REV. at 2182. "[T]he right to petition guaranteed access to a legislature that had enormous power over ... private grievances." Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV.L.REV. 1381, 1387 n.15 (1998).

"From the beginning, the primary responsibility of colonial assemblies was the settlement of private disputes raised by petitions." Stephen Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALEL.J. 142, 145 (1986). "[T]he assemblies in the eighteenth century ... constantly heard private petitions, which often were only the complaints of one individual or group against another, and made judgments on these complaints." Gordon Wood, The Creation of the American Republic 1776-1787, 154-55 (1969). "The Connecticut General Assembly usually acted on more individual causes than on legislation. Virginia and Maryland had similar experiences." Andrews, 60 OHIOST.L.J. at 605-06 (footnotes omitted).

The petitions considered by the colonial assemblies included submissions by government employees raising employment-related problems. In New York

both colonial commissioners and British soldiers stationed in the colony petitioned the Assembly for compensation;[29] even the Doorkeeper, Printer and Clerk of the Assembly filed a petition asking to be paid their salaries.[30] In Connecticut "the governor's own guard had to petition the Assembly for their arms and expenses." Higginson, 96 YALE L.J. at 152. Other petitions concerned such purely private matters as divorces, debt actions, estate distributions, and requests for relief from creditors.[31]

The origins of petitioning in England clearly encompassed petitions on private matters. Prior to Magna Carta the use of petitions appears to have been largely reserved for "property disputes between individuals." Mark, 66 FORDHAM L. REV. at 2164 n.26. "The ability to apply for redress of grievances was, at least in its earliest stages, clearly not a tool for general grievances." *Id.* at 2164. In the fourteenth century petitions commonly asked "for relief of a judicial nature on private matters." Andrews, 60 OHIO ST. L.J.

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[29] Desan, 111 HARV. L. REV. at 1431 and n.218, 1465 nn.386-87.

[30] Desan, *Remaking Constitutional Traditional the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW AND HIST. REV. 257, 298 n.104 (1998).

[31] James Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims against the Government*, 91 NW. U.L. REV. 899, 932 (1997); Higginson, 96 YALE L.J. at 145; Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

at 597-98. During the reign of Edward I petitions often concerned "disputes relating to private parties only."[32] In the seventeenth century "[t]he business of Parliaments became the business of rendering decisions in private disputes between party and party," including "relatively mundane disputes over real property, debt, inheritance, wages, contracts and a variety of domestic matters." James S. Hart, Justice Upon Petition: The House of Lords and the Reformation of Justice 1621-1675, 3-5 (1991). "Before the late Eighteenth Century, parliament received few petitions on state affairs." Norman Smith, "*Shall Make No Law Abridging ...* ": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U.CIN.L.REV. 1153, 1167 n.82 (1986).

As petitioning developed in England, "[i]t was the collective right to petition, not the individual right, that was uncertain." Andrews, 60 OHIOST.L.J. at 628. In 1661 Parliament adopted the Act Against Tumultuous Petitioning, which required that petitioners obtain prior approval from certain local authorities before soliciting signatures of more than twenty persons on a petition "for alteration of matters established by law in church or state";[33] no such limitation applied to petitions on other matters. The preface to the Act explained that "violations of the public peace"

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[32] Ludwik Erhlich, Proceedings Against the Crown (1216-1377), in 6 Oxford Studies in Social and Legal History 96 (1921).

[33] 13 Car. 2, c. 5 §1, *reprinted in* 5 Statutes of the Realm 308 (spelling and capitalization modernized).

had been triggered by petitions signed by large numbers of individuals seeking "redress of pretended grievance in Church or State, or other public concernments."[34] At the 1688 trial of the *Seven Bishops Case*, which played a pivotal role in both the right to petition under English law and the Glorious Revolution of 1689, the most conservative member of the court suggested that the right to petition extended only to private matters.[35]

This long history of redressing petitions on private matters, dating from centuries before the Revolution and very much part of the daily activity of the First Congress, leaves no doubt that the framers of the petition clause would assuredly have understood and intended that such petitions were to enjoy constitutional protection.

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[34] *Id.*

[35] 12 Howell St. Tr. at 427-28 (Allybone, J.):

> It is the business of the government to manage matters relating to the government; it is the business of subjects to mind only their own properties and interests. If my interest is not shaken, what have I to do with matters of government?

Id. at 428-29 (Allybone, J.):

> I do agree, that every man may petition the government, or the king, in a matter that relates to his own private interest.

III. THE PETITION CLAUSE RIGHTS OF GOVERNMENT EMPLOYEES ARE NOT LIMITED TO PROTECTIONS WITHIN THE "CORE" OF THAT CLAUSE

Few constitutional rights are absolute. The invocation of a constitutional guarantee often requires the courts to balance the extent of the constitutional interest at issue against the importance of any government stake in the action that impinges on those interests. Where the constitutional interest is more modest, it can be outweighed by a lesser showing of governmental justification. But so long as the challenged action impinges in any way on the constitutional right in question, the government must show that some legitimate public purpose outweighs that constitutional right.

That balancing approach is the methodology normally utilized by this Court in resolving constitutional claims by government employees. Thus in *City of Ontario, Cal. v. Quon*, 130 S.Ct. 2619 (2010), the Court in upholding the reasonableness of the search of Quon's text messages explained that "the extent of a[ny reasonable] expectation [of privacy] is relevant to assessing whether the search was too intrusive." 130 S.Ct. at 2631.

In the instant case, however, defendants urge the Court to discard that traditional balancing approach, and instead to delineate a category of non-"core" petitioning from which public employees can be forbidden to engage. Defendants do not contend that

non-core petitions are outside of the scope of the petition clause. But where public employees are involved, they insist, the petition clause protects only core petitions, those regarding matters of public concern. Petitions on other matters can be prohibited, and can be the subject of reprisals, without any showing that the petition in question adversely affected any identifiable government interest. An employee's petition on a matter of public concern is protected, even if the amount claimed is small and the chances of success are slim. But a public employee's petition on any other matter is unprotected, even if the worker's unquestioned damages are considerable and the merits of the petition are undisputed.

Neither *Connick* nor *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008), warrant such a rigid bifurcation of the petition clause. The decision in *Connick* to limit free speech rights of government employees to expression on matters of public concern rested on a special problem unique to freedom of speech. As the Court noted in *Connick*, virtually all employment decisions involve some sort of statements by the worker affected. Thus if the traditional constitutional balancing test were applied whenever any type of speech was a factor, almost all government personnel decisions would give rise to constitutional claims. "[G]overnment offices could not function if *every* employment decision became a constitutional matter." 461 U.S. at 143 (emphasis

added). "To presume that *all* matters which transpire within a government office are of public concern would mean that virtually every remark ... would plant the seed of a constitutional case." 461 U.S. at 149 (emphasis added).

In *Engquist* a similar practical concern supported the Court's decision that government employees may not bring class-of-one claims under the Equal Protection Clause.

> If, as Engquist suggests, plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in *nearly every* instance of an assertedly wrongful employment action ... on the theory that other employees were not treated wrongfully.

553 U.S. at 607-08 (emphasis added). *Engquist*, however, did not hold that this problem alone would have warranted barring class-of-one claims by public employees. The Court also emphasized that such claims were "simply a poor fit in the public employment context" because employment decisions typically involve a high degree of subjective individualized determinations quite unlike the situation for which

the class-of-one doctrine had been framed. 553 U.S. at 605.

Engquist itself makes clear that whether or not a particular constitutional claim falls at the core of the constitutional right involved is not by itself dispositive; a claim outside (or further from) that core is not irrelevant, but merely more easily overcome by a showing of governmental interest.

> Our precedent in the public employee context therefore establishes two main principles: First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be *balanced* against the realities of the workplace. Second, in striking the appropriate *balance*, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.

553 U.S. at 600 (emphasis added). The principle that claims outside the basic concerns of a constitutional provision "*can* more readily give way to the requirements of the government as employer" does not mean that such claims *must* fail in every case, without any showing that recognition of that claim would interfere with some identified requirement of the employer.

Petitions do not pose the same threat as speech claims and class-of-one claims of turning essentially every employment decision into a constitutional

dispute. Although all government employees constantly make work-related statements on matters that are not of public concern, and although almost all of those employees are the subjects of repeated individualized decisionmaking, it is far less common for those workers to be involved in lawsuits, the filing of grievances, or similar petitioning. Defendants acknowledge that "many everyday workplace complaints do not seek to 'invoke[ ] a mechanism for redress of grievances against the government.'" (Reply Brief for Petitioners 4 (quoting *San Filippo v. Bongiovanni*, 30 F.3d 424, 439 n.18 (3d Cir.1994)). "It is also true that most office mails, letters, oral remarks, and phone calls do not." (Reply Brief for Petitioners 3).

Every federal constitutional right cannot be bifurcated in the manner urged by defendants. The standard utilized in *Connick* involved a longstanding distinction in free speech caselaw; no such distinction is to be found in this Court's petition clause decisions. So long as an infringement of otherwise protected constitutional interests must be justified by some identified governmental interest, an assessment in each case of the importance of those interests does not have the drastic consequences of defendants' proposed per se rule. On the other hand, if the core of the petition clause can be held limited to matters of public concern, and non-core petitioning can be forbidden or the subject of constitutionally permissible reprisals, an equally plausible argument could be made for bifurcating other First Amendment rights.

The assembly clause might permit the dismissal of a government employee for attending a meeting about employment matters not of public concern and the free speech clause might permit the dismissal of a government employee for attending a trial about, or owning a book concerning, an employment matter not of public concern. An insistence on subdividing every constitutional guarantee would often if not invariably result in downgrading certain rights to a second class status in a manner that the framers never envisioned. It is difficult to imagine, for example, how the right of public employees to free exercise of religion could be divvied up. Surely the free exercise clause does not permit the dismissal of public employees if they are overheard praying about a work-related matter that is not of public concern.

IV. THE CORE RIGHTS PROTECTED BY THE PETITION CLAUSE ARE NOT LIMITED TO PETITIONS CONCERNING MATTERS OF PUBLIC CONCERN

(1) The essential purpose of the petition clause is to protect the right of a petitioner to seek redress. "[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002).

The history described above makes clear that in England and the colonies petitions regarding private matters were the very practice from which the right

to petition first arose. Such appeals for redress constituted the largest portion of the petitions which the Congress and the state legislatures were addressing at the end of the eighteenth century. Neither the Congress which framed the petition clause nor the state legislatures which ratified that constitutional guarantee would have imagined that a petition was less entitled to protection because that petition concerned, however urgently, only the particular individual who had submitted it.

(2) Defendants offer several accounts of the asserted "core" purpose of the petition clause, none of which provide a persuasive account of why the clause should be limited in this manner.

Defendants suggest, first, that the "basic" goal of the petition clause is "assur[ing] unfettered exchange of ideas." (Pet.Br. 38, 39) (quoting *Connick*, 461 U.S. at 145). But the petition clause is limited to petitions to "the Government." That clause is expressly inapplicable to an individual's efforts to exchange ideas with members of the public. A written submission to government officials that merely contained a detailed discussion on some matter of public concern, but that lacked any explicit or implicit request for redress, would not be within the scope of the petition clause. To the extent that petitions do convey ideas, the petitioner surely does not expect government officials to respond with their own views, initiating some sort of enlightening debate. A petition may elicit a response; a judge, for example, may rule on the merits of a lawsuit. But that judicial action would not

sensibly be described as some sort of "exchange of ideas" with the plaintiff.

Defendants argue in the alternative that the petition clause was adopted primarily because it is "necessary" to assure that members of the public, having discussed among themselves matters of public importance, will be free from reprisal when they communicate their ideas to government officials. (Pet.Br. 14). Thus the core purpose of the petition clause would be to safeguard the statements to government officials which, because of their audience, would somehow be unprotected by the free speech clause. But there is no such loophole in the free speech clause which the petition clause is "necessary" to fix. Defendants offer no explanation, and none is readily imaginable, why a statement about a matter of public concern, otherwise protected by the free speech clause, would not be equally protected if it were addressed to a government official.

Third, defendants suggest that the core purpose of the petition clause is to protect the ability of the public to express to government officials the "will" of "the people," thus assuring "democratic self-government." (Pet.Br. 17). It is primarily a mechanism "to register popular opinion with the government." (Pet.Br. 25). That core purpose assures that the government will be "responsive to the will of the people." (Pet.Br. 19) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). This proffered basic purpose would presumably be limited to petitions that convey the "will of the people" and thus

would not include petitions from individuals whose views conflict with the opinions of the majority, no matter how important the subject at issue. But the guarantee of the petition clause is not "primarily collective in nature." *District of Columbia v. Heller*, 554 U.S. 570, 579 n.5 (2008). If the petition clause rights of public employees were limited to this proffered core purpose, moreover, those rights would assuredly exclude petitioning directed to judges on any subject whatever, because the judiciary is charged with making its decisions based on law and evidence, not based on the will of the people.

Defendants' arguments misapprehend the distinctive role of the petition clause. The petition clause protects the right of an aggrieved individual to seek correction of his grievance. The standard by which a proffered grievance is justice,[36] not public opinion. That is why the protections of the petition clause are denied to baseless claims,[37] even if they enjoy widespread public support, but encompass meritorious claims that may be anathema to most people. The central purpose of a petition is not to convey an idea, or to spark a debate, but to obtain redress. Petitions,

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[36] When the King received a petition of right, asserting that property in the hands of the crown was actually owned by the petitioner, he could refer the petition to court by endorsing it with the words "'soit droit fait al partie' (let right be done to the party)." 3 William Blackstone, Commentaries on the Laws of England *256 (St. George Tucker ed. 1803).

[37] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993).

of course, may well convey ideas; the letters in *McDonald* obviously did. But petitions are not merely – or primarily – a particular form of expression, like "expression to the President," "expression to a judge" or "expression on Mondays."

(3) Defendants rely on brief references to the history and purpose of the petition clause that were contained in this Court's decision in *McDonald v. Smith*. The particular question at issue in *McDonald*, whether the petition clause protects libelous statements in a petition, is not before the Court in the instant case, and we do not ask that it be reconsidered. But the account in *McDonald* of the origins and original purpose of the petition clause has been undermined by subsequent scholarship,[38] and does

[38] Julie Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth*, 21 HASTINGSCONST.L.Q. 15, 15-42 (1993); Eric Schnapper, *'Libelous' Petitions for Redress of Grievances – Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989); Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIOST.L.J. 557, 568 n.28 (1999); Norman Smith, *"Shall Make No Law Abridging ...": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U.CIN.L.REV. 1153, 1184-88, 1196-97 (1986); Stephen Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALEL.J. 142, 143 n.2, 166 (1986); Ronald Krotoszynski, *The Return of Seditious Libel*, 55 U.C.L.A.L.REV. 1239, 1306-08 (2008); Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 NW.U.L.REV. 739, 739 (1999); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV.L.REV. 1111, 1114 (1993); James Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right To Pursue*

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not provide a sound basis for defendants' crabbed interpretation of the petition clause.

McDonald stated that the petition clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." 472 U.S. at 485. However, the use of petitions to obtain redress of grievances, and the recognition that such petitions should be protected from reprisal, predate by many centuries the ideas of freedom of speech and press and the emergence of democratic institutions. "The practice of petitioning the King for redress long antedated Magna Carta." Mark, 66 FORDHAM L. REV. at 2163. In 1215 Magna Carta the king recognized a right to petition, "grant[ing] to our subjects the following security," that if the charter were violated, or "if We, our justiciary, bailiffs, or any of our ministers offend in any respect against any man," representatives of the barons "shall come before Us ... declaring the offense, and shall demand speedy amends for the same." Magna Carta: Text and Commentary (A. E. Dick Howard ed.) 50. Assuredly neither King John nor any of the barons at Runnymede adhered to the ideals of democracy or believed in freedom of speech or freedom of the press. "[T]he right to petition emerged and was formed in a period before anything resembling modern notions of representative government gained

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Judicial Claims Against the Government, 91 NW.U.L REV. 899, 905 (1997).

any prominence." Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 NW.U.L.REV. 739, 755-56 (1999). "The right to petition emerged in England largely as a substitute for ... formal mechanisms of representation." *Id.* at 761.

As Magna Carta illustrates, the right to petition was widely recognized in England (and, later, in the colonies) long before the idea of freedom of speech had taken root in the law. In the seventeenth century the right to petition was expressly codified in a 1622 proclamation of King James I, the 1642 Massachusetts Body of Liberties, a 1669 resolution of the House of Commons, and the 1689 Bill of Rights. Smith, 54 U.CIN.L.REV. at 1157-60. Not one of these guarantees provided for freedom of speech or freedom of the press. To the contrary, even after the 1689 Bill of Rights the press in England and the colonies remained subject to licensing, and those who criticized the government (except in petitions) were still prosecuted for sedition well into the eighteenth century.

> On February 24, [1702] the House [of Commons] passed two resolutions: first, that the people have a right to petition the king for redress of grievances, and second, that it is an offense to publish any writings "reflecting upon the proceedings of parliament or any member thereof...." These two resolutions highlight the opposite values placed on petition and press at the time; the right to petition was protected, and the press was rigorously suppressed.

Id. at 1165 (footnotes omitted)

"Under English common law and statute, only documents that qualified as petitions were protected from formal political retaliation by governmental authorities." Mark, 66 FORDHAML.REV. 2201.

> Historically, the right to petition was a distinct right, superior to other expressive rights.... When the English government first began to speak of petitioning as an 'inherent right' of citizens, the rights of speech, press, and assembly were regulated. Petitioners were not punished (as they would have been under the regulations specifically directed to speech, press, and assembly).

Julie Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth*, 21 HASTINGSCONST.L.Q. 15, 17-20 (1993). At the 1688 trial of the *Seven Bishops Case* the court emphatically rejected the prosecution's contention that a petition was entitled to no greater protection than a book; only petitioning, they insisted, was "the birthright of the subject."[39] Both in England and in the colonies petitioners carved out a greater degree of protection for expression by "expand[ing] the notion of what the meaning of a grievance was, so that a petition seeking a redress of a grievance often became more than a request for an individual remedy or plea for assistance." Gregory Mark, *Right to Petition*, in 5 Encyclopedia of the American Constitution (2d ed. L. Levy and K. Karst eds.) at 2272 (2000).

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[39] 12 Howell State Trials 419-20 (Holloway, J.).

(4) Defendants suggest that, whatever the meaning and purpose of the right to petition under English law, it acquired a new essence and scope when incorporated into the Constitution. The fatal defect in the Third Circuit opinion in *San Filippo*, they argue, was that it "considered *only* what 'the right to petition ... was intended to mean in England three centuries ago.'" (Pet.Br. 22 (emphasis added) (quoting *San Filippo*, 30 F.3d at 443)). Subsequent developments in America, defendants imply, gave the right a new and narrower meaning. But only the most compelling circumstances could establish that the framers of the Bill of Rights intended that any of its provisions would provide a lesser guarantee of liberty than the colonists had enjoyed under English law. Precisely to the contrary, the petition clause safeguards the "right" to petition the government, clearly referring to an already recognized liberty, not constructing some new and possibly more restricted version.

Defendants suggest that the framers tacitly narrowed the scope of the right to petition by including the petition clause in the same amendment as the free speech clause. (Pet.Br. 17). But in the earlier drafts of the Bill of Rights the petition clause and the free speech clause were in separate provisions, as they were in all of the state constitutions and bills of rights of the era. It is difficult to believe that the framers intended to limit the scope of the petition clause, without any relevant alteration in the actual words of the clause itself, simply by grouping it with

the other five guarantees of the First Amendment. Surely the state legislatures which ratified that Amendment could not have understood that such a change was intended.

V. SECTION 1983 ACTIONS ARE PROTECTED BY THE PETITION CLAUSE

(1) Of the two petition clause claims asserted by Guarnieri, defendants voice particular objection to the claim that he was protected by the petition clause when he filed his original section 1983 action in federal court. Defendants object at length to the burdens that they assert such lawsuits, if protected by the petition clause, would impose on public employers. (Pet.Br. 13, 41-43, 51). Employers could escape those burdens, defendants suggest, if the petition clause were not construed to bar reprisals against the workers who seek redress by filing section 1983 lawsuits; in the absence of such a prohibition, public employers would be able to avoid the harshness of this redress mechanism by employing the threat or use of reprisals to deter their workers from filing such burdensome section 1983 suits against government officials or bodies.

Despite the fact that defendants are contending that the petition clause permits them to retaliate against plaintiffs because they sought to enforce federal rights in a court of the United States, the Solicitor General supports their position. The government's brief identifies as the concern of the United

States in this case only its interest as "the nation's largest public employer." (U.S.Br. 1). The Solicitor General expresses no similar interest in whether individuals who seek to enforce federal rights in federal courts will be subject to reprisals. Like defendants, the government asserts that "the central purpose of the Petition Clause was access to the legislature." (U.S.Br. 17 n.5).

(2) The decisions of this Court emphatically establish that the petition clause applies to the judicial branch of the government, and thus encompasses a right of access to the courts. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). "The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts ... for redress of alleged wrongs.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (quoting *Bill Johnson's Restaurants*). "[A] complaint in court is a form of petitioning activity." *McDonald v. Smith*, 472 U.S. 479, 484 (1985). "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

In questioning the importance under the petition clause of petitions directed to the courts, the United States and defendants rely on a statement by James Madison, which the Solicitor General describes as

"stating that [the] Petition Clause was designed to protect the peoples' right to apply 'to the Legislature by petitions, or remonstrances, for redress of their grievances.'" (U.S.Br. 17 n.5; see Pet.Br. 40 n.7). What the government is quoting, however, is not an explanation of the petition clause that Congress actually adopted, but the substance of Madison's own unsuccessful proposal for a much narrower petition clause, a proposal that by its terms would have applied only to petitions "to the Legislature."[40]

Congress, however, rejected this more restricted draft. Representative Sherman successfully urged instead that the right to petition be expanded to include petitioning the "government."[41] On July 28, 1789 the Select Committee proposed the broader language that became the House version of the petition clause. "The ... right of the people to ... apply to *the government* for redress of grievances, shall not be infringed." 2 Schwartz at 1122 (emphasis added). The expansion of the petition clause to include petitions to "the government" departed both from Madison's proposal and from the terms of the contemporaneous state petition clauses. "The text and drafting history

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[40] The quoted words are preceded by Madison's statement that "[t]he amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are these." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971).

[41] Helen E. Veit, et al., Creating the Bill of Rights, The Documentary Record from the First Federal Congress 266-68 (1991).

make clear that the framers of the Petition Clause ... deliberately chose to broaden the clause to encompass submissions not only to the Congress ... but also to the executive and judicial branches of the federal government." Pfander, 91 NW.U.L.REV. at 900. "Unlike all of its state predecessors, the Petition Clause speaks of the right to petition the 'government,' not the legislature, for a redress of grievances.... [T]he reference to 'Government' ... conveys a[ ] ... clear[ ] three-branch message." *Id.* at 956.

The decision of the framers to include all branches of the government in the petition clause was consistent with the history of petitioning in England and with the scope of petitioning that was common in the colonies. Although petitions at the time of Magna Carta were directed only to the King, as courts emerged in the later Middle Ages it became increasingly common for the King, and the Parliament, to refer petitions to those courts for resolution. Petitions were often forwarded to the Lord Chancellor, the King's advisor, for a recommendation; over time the Chancellor acquired the authority to decide those petitions on his own, and from that practice the Court of Chancery emerged. In many cases proceedings in the courts were styled as petitions to the King.[47] In the

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[47] This history is summarized in Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIOST.L.J. 557 (1999), James Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right To Pursue Judicial Claims Against the Government*, 91 NW.U.L.REV. 899 (1997), and Julie

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United States in 1789 many legal proceedings were commenced with a pleading entitled a petition, a practice that continues to this day in petitions for habeas corpus and for a writ of mandamus.

(3) Defendants strongly object to according constitutional protection to petitions directed to the courts, insisting that use of the courts is a particularly draconian method for redressing grievances. Consideration of petitions in the courts, they contend, intimidates and distracts government officials, imposes exorbitant costs, and stirs up divisiveness. (Pet.Br. 13, 41-43, 51). The United States adds that lawsuits burden the government because they require a response, and because "public lawsuits ... are matters of public record." (U.S.Br. 20 (quoting *San Filippo*, 30 F.3d 449 50 (Becker, J., dissenting)). Petitions seeking judicial redress, both warn, may well be worse than mere speech. (U.S.Br. 20; Pet.Br. 13, 41).

But redress through the courts is the mechanism that Congress selected in 1871 to remedy violations of federal constitutional rights by state officials. The judicial redress provided by section 1983 replaced over time the quick, efficient, cost-free – but surely more intrusive – justice that was being meted out during Reconstruction by the Union Army stationed across the South. It would be wholly impractical for

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Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth*, 21 HastingsConstLQ 15, 43-49 (1993).

Congress to provide redress for constitutional violations by holding individualized hearings, and enacting private bills, for every claim asserting a violation of federal rights. Neither defendants nor the Solicitor General suggest how, other than by lawsuit, Congress could provide redress for Guarnieri's grievance-based retaliation claim or for other violations of federal constitutional rights.

Defendants argue that the redress mechanism provided by section 1983 is an affront to federalism. (Pet.Br. 52, 57). Precisely to the contrary, when as in the instant case an individual contends that his federal rights (here the asserted petition clause right to seek redress for the grievance-based retaliation) have been violated, it is entirely appropriate that Congress should create a federal cause of action in section 1983 and provide for federal subject matter jurisdiction in 28 U.S.C. §§1331 and 1343.

Defendants object to several aspects of the particular remedial scheme associated with section 1983. They complain that section 1983 actions can be brought against individual officials who often enjoy only qualified, but not absolute immunity; such individual liability, defendants argue, may distract and intimidate government officials. (Pet.Br. 41). Defendants argue that if the petition clause protects lawsuits, claimants will be encouraged to bypass less formal mechanisms for resolving disputes. (Pet.Br. 32, 41). Section 1983 itself indeed permits plaintiffs to file suit without exhausting administrative remedies. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496

(1982). Defendants take particular umbrage at the decision of Congress to enact the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, which authorizes awards of counsel fees to successful section 1983 plaintiffs. (Pet.Br. 10-11, 43). But Congress was empowered by section 5 of the Fourteenth Amendment to make all of these choices in fashioning a remedial mechanism to redress violations of federal constitutional rights.

None of these objections, moreover, has any apparent connection to the question before the Court. If, as defendants and the United States contend, lawsuits are a particularly harsh method of providing redress for the grievances of petitioners, and perhaps for that reason less deserving of constitutional protection, the magnitude of the burden on government defendants assuredly is not somehow greater when the subject of the lawsuit is a matter of interest only to the litigants. To the contrary, insofar as the defendants object that lawsuits can be divisive, and insofar as the United States objects that lawsuits and trials are public, those asserted problems are assuredly greater when a lawsuit involves a matter of public concern.

VI. THE PETITION CLAUSE APPLIES TO AN ARBITRAL FORUM AUTHORIZED BY THE GOVERNMENT TO PROVIDE REDRESS

The collective bargaining agreement signed by the Borough and the police officers provided that

those officers, including Guarnieri, could only be dismissed for "just cause." Absent some contrary provision, that contractual agreement would have been enforceable in the courts. The petition clause would have protected Guarnieri if he had sought judicial redress for a violation of that agreement.

Under the terms of Article 16 of the 2003 collective bargaining agreement, however, the parties provided that redress for a violation would instead be provided by an arbitrator selected by Borough officials and the grievant. If a police officer sought redress under Article 16 for an asserted violation of the agreement, the parties agreed that the decision of the arbitrator would be "final and binding."

In these circumstances Guarnieri's grievance and request for arbitration were a petition to "the government" for redress. It was the Borough of Duryea which, by signing the collective bargaining agreement, empowered the arbitrator to provide redress to Guarnieri. By agreeing that the decision of the arbitrator would be "final and binding on the parties," the Borough conferred on the arbitrator authority to determine the actions of city officials. In this case the ultimate power to decide whether Guarnieri would be restored to his government position as Chief of Police, the Borough agreed, was to rest in the hands of the arbitrator. This delegation of municipal authority is expressly authorized by Pennsylvania statutes.[43]

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[43] 42 Pa Cons Stat. §§7302(b), 7302(d)(1)(ii), 7303

Where, as here, the government has "delegated its authority to [a] private actor," thus conferring on that individual the "mantle of authority" to determine how the government itself will act, that individual is a government actor for constitutional purposes. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); see *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 625 (1991) ("If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate.").

Defendants object that the arbitral forum was not a court. (Pet. Br. 27-28). But the petition clause does not merely protect the right to petition the courts, or the courts and legislature, for redress of grievances. The clause safeguards the right to protect "the government" for such redress. It is true, of course, that the framers of the Bill of Rights were not familiar with modern arbitration as a method of providing redress, just as they were unfamiliar with any number of other redress mechanisms and modes of government, such as administrative law judges, that have been devised over the course of the centuries following the adoption of the Bill of Rights. But the protections of the petition clause are not limited to government institutions as they existed in 1789; they apply to the government, however its institutions may over time grow and change. The history of petitioning during the centuries that preceded the adoption of the First Amendment was one of ongoing evolution. What began as petitions directed only to

and determined solely by the King himself evolved into petitioning that was directed to and resolved by royal officials, then by Parliament, then by triers appointed by Parliament, and ultimately by a succession of courts. The protection accorded the right to petition followed the development of these emerging institutions. The framers cannot be assumed to have intended that new modes of governmental redress that might be fashioned in the years ahead would fall outside of protections of the petition clause.

The defendants object that "[s]imply arbitrating Guarnieri's first grievance cost Duryea $30,000 in legal fees." (Pet Br. 43) (emphasis omitted). If the Borough, unconstrained by the petition clause, were free to retaliate against any employee who resorted to arbitration, few if any current employees would do so, thus saving Duryea such litigation costs. But those costs are a consequence of the choice that Duryea itself made when it agreed that disputes arising under the collective bargaining agreement would be resolved by arbitration. Presumably the city thought that a prudent choice, compared to the time and expense that would be involved if disputes under the contract were resolved (as they might have been absent Article 16) in court.[*] "By agreeing to arbitrate

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[*] As part of the agreement that provided for resolving contract disputes by arbitration, the Duryea police officers agreed that they would not seek to resolve such disputes by means of a strike or "slow down" (P Ex. 41 p. 32), a provision clearly to the Borough's advantage.

. . . , a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see *id.* at 633 ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate disputes."). Perhaps the Borough in retrospect should have devised, and obtained agreement to, some remedial mechanism even more efficient that arbitration. But having itself selected arbitration in 2003 as the method for resolving disputes under the contract, and for providing redress to aggrieved police officers, the Borough cannot reasonably insist that it should be able to use reprisals to prevent use of the very remedial mechanism that government itself fashioned and empowered.

The Court need not in this case delineate all the circumstances in which a public employee's invocation of a redress mechanism would be sufficiently distinct from an ordinary internal complaint to be protected by the petition clause. If the Court undertakes to do so, it should hold that a public employee engages in action protected by the petition clause when that employee (1) seeks redress from an entity or individual, such as a court, arbitrator, or administrative agency, that is authorized to provide redress and that is distinct from the employing agency, (2) seeks redress from a reviewing entity or individual of a decision by the employing agency that has become

final for purposes of the statute of limitations, see *Ricks v. Delaware State College*, 449 U.S. 250, 261 (1980), or (3) seeks redress in a process in which the government has provided that the employee may be represented by an attorney or other individual. The petition clause necessarily applies to any step which is a prerequisite to a particular constitutionally protected form of petitioning, such as the filing of a notice of claim. On the other hand, an employee's actions are not protected if the claim at issue lacked a reasonable basis.

VII. UPHOLDING GUARNIERI'S PETITION CLAUSE CLAIM WILL NOT UNDERMINE *CONNICK*

Interpreting the petition clause to provide greater protections than the free speech clause, defendants predict, will lead to a litigation tsunami of biblical proportions. Such a construction of the petition clause would "dramatically increase the volume ... of public employment litigation" (Pet.Br. 36), trigger "an onslaught of ... litigation," cause federal claims to "expand exponentially" (Pet.Br. 48), and "open the federal floodgates" (Pet.Br. 48) (quoting *Altman v. Hurst*, 734 F.2d 1240, 1244 (7th Cir.1984)). These are the dire consequences that "will" (Pet.Br. 13, 48) and "would" (Pet.Br. 36, 42) follow from adoption of the rule in *San Filippo v. Bongiovanni*. But *San Filippo* was decided more than sixteen years ago. Defendants do not contend that such a tidal wave of petition clause claims ever actually occurred in the Third Circuit. Predicting in 2011 the dire consequences of

the 1994 decision in *San Filippo* is like warning today of the Y2K computer collapse that will occur on New Year's Day 2000.

Defendants also assert that under *San Filippo* a public employee could readily evade the limitations of *Connick* through the "contrivance" of recasting any workplace gripe as a lawsuit or other form of petitioning. (Pet.Br. 48). But defendants do not identify any body of post-*San Filippo* litigation in the Third Circuit that involved such contrivances. They certainly do not advance that argument about the instant case. Guarnieri filed his 2003 grievance for the simple reason that he had lost his job and wanted it back, not because the grievance was a clever way to express the fact that he did not like being fired.

It is easy to understand why *San Filippo* has not had the grave consequences predicted by defendants. Public employees cannot, as defendants suggest, easily recast every "garden-variety public employment dispute" as a federal or state court claim. Most such disputes simply are not actionable. Public employees do not have the funds to hire lawyers to file lawsuits, and no sensible attorney would agree to litigate on a contingent fee basis a lawsuit that lacks any realistic chance of success. Some non-actionable disputes might provide a basis for a grievance under a collective bargaining agreement, but many employees are not covered by such agreements and often it would be impracticable or impossible to pursue a grievance without the support of the union in question. If grievance procedures were being misused in the manner described by defendants, public employers would have been in a position to modify them

to end that problem. A worker who, as defendants suggest, merely relabeled a gripe as a lawsuit or grievance, heedless of the lack of plausibility of that complaint under the applicable law or collective bargaining agreement, would not have been protected by *San Filippo*.

If a worker in the Third Circuit actually had no interest in the redress that a lawsuit or grievance might provide, he or she would be unlikely to initiate such a lawsuit or grievance simply because doing so would be protected by *San Filippo*. Defendants' argument mistakenly assumes that numerous government employees are vexatiously seeking a forum – other than discussions with friends and family – in which to vent with impunity personal gripes about their jobs. But in the instant case Charles Guarnieri was not the Julian Assange of northeastern Pennsylvania, looking for a devious way to leak the surprising secret that the former Police Chief of Duryea did not like getting fired. Mr. Guarnieri was a responsible law enforcement officer using the redress mechanisms provided by the Borough of Duryea and by the Congress to obtain the reinstatement and damages to which an arbitrator and a federal jury, respectively, concluded he was entitled.

CONCLUSION

In addition to arguments limited to the specific issue in this case, the government advances a far more sweeping contention. The Solicitor General insists that the Constitution should not be construed

in a way that confers upon public employees rights that reach "far beyond those enjoyed by their privately employed counterparts." (U.S. Br. 20). Such a principle of constitutional interpretation would call into question many of the constitutional rights of federal, state and local government workers, because employees in the private sector do not themselves enjoy any constitutional protections at all. On the government's view the meaning of the Bill of Rights would expand and contract to remain in line with whatever statutory rights were from time to time granted or denied to private employees. There are few if any statutory provisions, for example, that protect private employees from dismissal for opposing intrusive searches or accord them any procedural rights prior to termination. If the government's position were adopted, virtually all existing constitutional rights of government employees would have to be reconsidered to assure that they did not unduly exceed the statutory rights accorded to private workers.

Defendants offer a similarly expansive contention. State and federal statutes, they note, provide only partial prohibitions against reprisals. Pennsylvania law, for example, prohibits only certain retaliatory motives, forbids only particular methods of reprisal, and provides differing protections depending on the job of a public employee and the government body for which he or she works. (Pet.Br. 54-58). Federal statutes forbid reprisals against many, but not all, federal workers. Defendants contend that the petition clause – and, presumably, the entire Bill of

Rights – must defer to these legislative choices, and should not be construed to forbid types of reprisals, or to protect individuals, that the state or national legislation does not reach. On this view petition clause rights that existed when the clause was adopted in 1791, and when the Fourteenth Amendment was ratified in 1868, subsequently disappeared when state and federal legislation came to accord public employees significant, but in some respects less complete protections.

Both of these far reaching contentions are clearly incorrect. The scope of the rights guaranteed by the Constitution does not depend on the ever varying federal and state statutory provisions regarding the rights of private worker and public employees.

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI, Jr.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent and his amici do not point to a single case in which this Court has applied different standards to the same conduct under the Petition and Free Speech Clauses. There is none. Respondent also does not seriously dispute that the Third Circuit's rule favoring petition claims allows public employees to circumvent *Connick*'s public concern requirement. He argues over only *how often* it does so, Resp. Br. 60-62, and offers the suggestion that the cost of attorneys, *id.* at 61, who are not generally necessary for petitioning, will somehow foreclose this concern. In the end, however, he and his amici cannot deny that the Third Circuit rule would cover the activity in *Connick* itself. As one of the commentators respondent repeatedly cites, Resp. Br. vii, notes, "[Myers] was collecting the views of her fellow workers to present to her superiors—*classic petitioning activity*." Norman B. Smith, *"Shall Make No Law Abridging ...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1195 (1986) (emphasis added). Nor can they deny that the Third Circuit's rule applies to a mere announcement of an intention to file a claim—a simple oral "I'll sue," perhaps never to be acted upon. *See Bradshaw* v. *Twp. of Middletown*, 296 F. Supp. 2d 526, 546 (D.N.J. 2003).

Respondent and his amici also do not contend that the Third Circuit's justification for placing the Petition above the Free Speech Clause—that petitions do "not appeal[] over government's head to the general citizenry," *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007) (quoting *San Filippo* v.

Bongiovanni, 30 F.3d 424, 442 (3d Cir. 1994) can support their result. Instead, they abandon the Third Circuit's rationale in favor of a novel theory not argued or considered below—that at bottom the Petition Clause protects access to the courts or, as one amicus candidly describes it, a "right to litigate," AFL-CIO Amicus Br. 7-8. This justification, however, creates a hierarchy not only between speech and petitions but also among different types of petitions themselves. Under respondent's view, lawsuits would count as petitions but traditional petitions to Congress by public employees would not. See Resp. Br. 59-60 (defining how the Petition Clause covers public employees); see pp. 21-22, *infra*.

Respondent and his amici also do not deny that federal and state law and private labor agreements create a comprehensive and carefully tailored remedial mechanism that the Third Circuit's one-size-fits-all rule effectively displaces. Nor does respondent contest that public employers potentially faced with constitutional claims (and attorney's fees) for disciplining an employee will hesitate to manage the public work force effectively.

Instead, respondent and his amici (1) try to understate the conflict between the Third Circuit's rule and this Court's holdings in its public employment cases by mischaracterizing the purpose and operation of *Connick*'s public concern requirement and (2) seek to relitigate the case under a breathtakingly broad access-to-courts theory pressed and considered nowhere below—a theory that lacks adequate historical justification and fails to fit respondent's own case or the Petition Clause

more generally. As a result, much of respondent's effort, particularly his long historical exegesis, is simply misdirected.

I. RESPONDENT AND HIS AMICI MISUNDERSTAND THE PURPOSE AND OPERATION OF *CONNICK*'S PUBLIC CONCERN REQUIREMENT

Just last month in *NASA* v. *Nelson*, 131 S. Ct. 746 (2011), this Court reiterated how differently courts should review public employment claims from claims involving the general citizenry:

> When the Government asks [employees to do something], it does not exercise its sovereign power to regulate or license. Rather, the Government [acts] in its capacity as proprietor and manager of its internal operation. Time and again our cases have recognized that the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large. This distinction is grounded on the common-sense realization that if every employment decision became a constitutional matter, the Government could not function.

Id. at 757-758 (citations and quotation marks omitted).

In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court held specifically that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the speech of the citizenry in general," *id.* at 568, and that in such

cases the courts should "balance * * * the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *ibid.*

In *Connick* v. *Myers*, 461 U.S. 138 (1983), this Court further held that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147. *Connick* thus recognized that when no matter of public concern is involved it makes no sense to proceed to full *Pickering* balancing because the employee has no relevant interests to be balanced against his employer's. When that is true, the case is appropriately dismissed at the start. As this Court explained in *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam), the purpose of *Connick*'s public concern requirement is to avoid *Pickering* balancing, which itself can frustrate effective government:

> To require *Pickering* balancing in every case * * * could compromise the proper functioning of government offices. This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit

> *Pickering* balancing, a public employee's speech must touch on a matter of "public concern."

Id. at 82-83 (citation omitted). There is simply no reason to balance the employee's interests against the employer's and subject the employer to further court process when the employee asserts no injury to an interest that the First Amendment recognizes as relevant.

Respondent fails to understand this logic. Although he nowhere cites *Pickering*, respondent concedes that balancing represents the proper approach. Resp. Br. 35-40. He would have the courts balance, however, "in each case," *id.* at 39, regardless of whether the employee has shown that any of his cognizable interests "as a citizen," not just his "personal interest" "as an employee," were implicated. See *Connick*, 461 U.S. at 147. Such an approach makes no sense. Contrary to *Connick*'s teaching, it would subject the employer to needless process and expense. Only if the public employee can show some interest "as a citizen," which means at the least that his actions concern something more than ordinary employment matters, there is simply no point to bringing the public employer to court.

Indeed, federal courts within the Third Circuit understand this logic, although there it cuts in the opposite direction. Recognizing that *Connick*'s public concern requirement functions as a short-cut to terminate at an early stage litigation that will necessarily fail full *Pickering* balancing, they reason that the Third Circuit's rejection of *Connick*'s public concern requirement necessarily implies a rejection of any *Pickering* balancing as well. See, *e.g.*, *Schlarp*

v. *Dern*, 610 F. Supp. 2d 450, 466 n.9 (W.D. Pa. 2009) ("[B]ecause the Petition Clause [under the Third Circuit's rule] affords individuals a right separate and distinct from that protected under the Free Speech Clause, the viability of a claim under the Petition Claus does not depend upon whether the specific criteria enunciated in *Pickering* * * * have been satisfied.") (citing *San Filippo*, 30 F.3d at 438-443). They understand that rejecting *Connick* means rejecting *any* balancing under *Pickering* and thus grant petitions unique constitutional protection. Against the grain of all this Court's public employment cases, the public employer's interests in effectively managing its workforce count for nothing. Respondent thus argues for an approach—applying full *Pickering* balancing in every case—that not only is illogical and causes needless disruption, but also is rejected by the very courts he believes apply the correct standard.

II. RESPONDENT'S MISUNDERSTANDING OF *MCDONALD* AND *CONNICK* LEAD HIM TO MISCHARACTERIZE PETITIONERS' ARGUMENT

Respondent's misunderstanding of *Connick* and constitutional public employment law, more generally also leads him to severely mischaracterize petitioners' arguments. Petitioners do not, for example, argue that the "very act of petitioning is not protected by the Constitution," Resp. Br. 7, that there is "no constitutionally protected right to file * * * grievance[s] and section 1983 actions," *id.* at 13, that "claims for workmen's compensation * * * ought not be protected by the petition clause," *id.* at 29, or,

even more surprisingly, that "THE PETITION CLAUSE [DOES NOT] PROTECT[] PETITIONS THAT ARE NOT ABOUT MATTERS OF PUBLIC CONCERN," *id.* at 22, a proposition respondent devotes nearly a quarter of his argument, *id.* at 22-34, to refuting. The question is rather how and to what extent the Constitution protects a public employee who engages in such conduct.

Indeed, *Connick* itself makes clear that public employee expression subject to its rule nonetheless receives constitutional protection, just not the degree and form respondent seeks. As the *Connick* Court made clear in carefully delimiting the scope of its holding,

> We do not suggest * * * that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with smaller ones, are guarded. We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that when a public employee speaks not as a citizen upon matters of

> public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

461 U.S. at 147 (internal citations and quotation marks omitted). Applying *Connick* to petition claims simply cannot mean that petitions on matters of private concern would receive no constitutional protection because *Connick* itself expressly rejected that possibility. Criminalizing petitioning the legislature on particular private subjects would, for example, raise grave constitutional doubts. The question this case presents, in other words, is not whether particular activity is "protected" under the Petition Clause, but whether such protection necessitates a broad, unprecedented exception to the general rule that government employment decisions do not ordinarily raise constitutional questions.

Nor do petitioners argue that public employers should be "free to retaliate against any employee who resort[s] to arbitration," Resp. Br. 58, or that states and localities should be able to "forb[id their] employees to sue [them] * * * and * * * dismiss any worker who d[oes] so," Br. in Opp. 30-31. That is like claiming that the employer in *Connick* argued

that states and localities could forbid all their employees from saying bad things about them and dismiss any who did so. Petitioners argue simply that the public employment policies that this Court has found exceedingly important in related free speech cases should have equal purchase in petition cases. The particular type of action an employee takes to complain—speech or petition—makes no difference as to any of the policies the *Connick* rule exists to vindicate.

III. RESPONDENT FAILS TO DISTINGUISH PETITION FROM FREE SPEECH CLAIMS

Respondent makes several attempts to distinguish petition from free speech claims, not one of which is successful. First, he argues that *McDonald* is not controlling because this case involves "petitioning as such," Resp. Br. 11-12, and "the very act of petitioning," *id.* at 13, whereas *McDonald* concerns only "statement[s] in a petition," *id.* at 9. This is a distinction without a difference and is, moreover, dubious on the facts. Petitioning is inherently expressive activity. It makes little sense to discuss a petition independent of its content and less still to argue that the mere act of petitioning deserves greater constitutional protection than this Court has provided for a petition's contents. See Resp. Br. 13 ("Had Guarnieri alleged that the defendants retaliated against him because of a particular statement in the grievance or complaint, that would present a different issue."). Such an approach, in fact, turns existing First Amendment doctrine upside-down. As this Court has long held,

"content-neutral" restrictions are generally subject to less sweeping review than "content-based" restrictions because the former "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994).

Under respondent's own view of the case, moreover, petitioners acted against him not because he simply petitioned government but because of what his petitions represented. As in *Connick* itself, they constituted just "another round of controversy with [his] superiors" over a personnel action. 461 U.S. at 148. That the added rounds occurred in arbitration and in court and involved more players, like lawyers, judges, and arbitrators, make them more disruptive to the public employer's management, not less.

Second, respondent argues that "*Connick* is not controlling here because that decision held only that a public concern requirement applies to constitutional claims that a statement by a public employee is protected by the free speech clause." Resp. Br. 14. That is, of course, trivially true. *Connick* did not concern the Petition Clause. But its policies apply as strongly in the one context as in the other.

Third, respondent contends that adopting *McDonald*'s principle of parity would make the Petition Clause "entirely redundant." Resp. Br. 15. But to the extent there is "redundancy" between these Clauses, *McDonald* is hardly the cause. "There were certainly petitions that did not constitute speech when the First Amendment was

ratified." *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 450 (3d Cir. 1994) (Becker, J., concurring and dissenting). Over time, however, the expansion of free speech has narrowed that category. *Ibid.* As a general matter, moreover, such "redundancy" is hardly a problem. The Speech and Press Clauses may overlap substantially, see, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 684 (1972), but no one mourns the latter provision as a "dead letter," *San Filippo*, 30 F.3d at 450 (Becker, J., concurring and dissenting).

Fourth, respondent argues that "[t]he practical and legal issues raised by speech and by petitioning are sufficiently different that the standard governing free speech cases should not be presumed to apply as well to petition clause claims, or vice versa." Resp. Br. 16. This, of course, turns *McDonald* on its head and the "differences" respondent points to offer weak, if any, support for doing so. That speech claims, for example, often address actions "at work," *ibid.*, whereas petitioning claims often address actions taken outside the employee's office, *id.* at 17, matters little when the actions—wherever they occur—affect the morale and management of the workplace itself. In general, the practical challenges the government faces as employer are at least as substantial when an employee files a formal grievance or lawsuit as when that employee lodges an informal complaint or simply engages in speech. Indeed, the Third Circuit itself has recognized that "employee lawsuits and grievances against a public employer can * * * be divisive in much the same way that employee speech can be." *San Filippo*, 30 F.3d at 441. The consequences of "constitutionaliz[ing]

the employee grievance," *Garcetti* v. *Ceballos*, 547 U.S. 410, 420 (quoting *Connick*, 461 U.S. at 154), are thus just as serious—if not more so—in the context of the Petition Clause.

Similarly, although respondent acknowledges that "*Connick* protects a public employer's 'broad discretion in responding to employees' purely work-related complaints,'" Resp. Br. 18 (quoting Pet. Br. 13), he believes it does not do so when those complaints happen to be embodied in particular types of petitions, *id.* at 19. But those complaints are still "purely work-related." Their presence within a grievance or lawsuit does not transform them into something of greater and wider concern.

Respondent also speculates that applying *Connick*'s public concern requirement to petitions would frustrate a need of Congress to receive petitions from federal employees. Resp. Br. 19-20. It suffices to say, however, that Congress has comprehensively legislated in this area and provided remedies, when appropriate. 5 U.S.C. § 2302(b)(8)(A). Most such complaints, moreover, would come through simple speech rather than through more formal petitions. In addition, since Congress does not ordinarily have the power to reinstate or set the work terms and conditions of individual federal employees, respondent's own view of the Petition Clause would not cover this particular type of petition. See Resp. Br. 59-60 (defining when public employee activity constitutes petitioning); p. 21, *infra*.

Respondent also contends that *Connick*'s public concern requirement should not apply to petitions

because whereas "the content of speech subject to *Connick* is immediately known, * * * whether a petition will involve a matter of public concern may not be knowable when the petitioner initially seeks redress." Resp. Br. 20. He envisions that, as here, an ordinary work-related complaint may implicate an issue of law that could reach the Supreme Court. *Id.* at 22 ("It is difficult to understand how the public concern requirement could be applied to a federal or state lawsuit [where Supreme Court review was] at least a possibility when it was first commenced.").

Respondent confuses, however, the employee's *underlying activity* with the *issue of law* his case might present. *Connick* concerns the former, not the latter. It asks whether the "public employee 'as a citizen'" was "commenting upon matters of public concern," 461 U.S. at 143 (quoting *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968)), not whether his expression might result in a case raising a legal issue that would later reach this Court. Indeed, if that were the case, all the speech in *Connick* itself would necessarily have satisfied the public concern requirement. But, of course, it did not. And why stop there? Since the *Connick* legal standard itself was once a matter of public concern, should it not still be so? People still litigate it and this Court still considers its ramifications. See, *e.g.*, *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam). By respondent's logic, any case applying the *Connick* standard would necessarily implicate a matter of public concern, namely, the scope and validity of the *Connick* rule itself. That would mean, however, that merely invoking the *Connick* standard would

automatically defeat it. Whatever *Connick* means, it cannot mean that.

IV. RESPONDENT'S BROAD NEW THEORY OF THE PETITION CLAUSE WAS NEITHER RAISED NOR CONSIDERED BELOW, LACKS ADEQUATE HISTORICAL SUPPORT, AND THREATENS TO UNSETTLE MANY WELL-ESTABLISHED AREAS OF LAW

Respondent and his amicus the ACLU argue that this Court should adopt a theory of the Petition Clause that grounds it in a general right of access to the courts. This Court has never held the Petition Clause to be so expansive and there is no reason for it to do so now.

First, respondent did not raise this theory in either of the courts below. Respondent's brief to the court of appeals spends few words on the retaliation issue and those few almost exclusively argue that the Third Circuit should apply *San Filippo* as binding circuit precedent. That brief notably omits any mention of "right of access to the courts." *See* Resp. C.A. Br. 37-39. Despite its extensive development by both respondent and the ACLU in their merits briefs, the theory made its very first appearance in this litigation in respondent's brief in opposition, *see* Br. in Opp. i. While the courts below were asked to consider and decided a claim grounded in the First Amendment, the sweeping right of access claim respondent and the ACLU now press "implicates not only the petition clause, but also the due process clauses of the Fifth and Fourteenth Amendments and the privileges and immunities

clause of Article IV of the Constitution." ACLU Amicus Br. 3. Even if these new legal theories had any bearing on respondent's own case, which they do not, respondent advanced none of them below, neither court considered them, and this Court should not now hear them. *United States* v. *Estate of Romani*, 523 U.S. 517, 526 n.11 (1998) (noting that although a "respondent may defend [a] judgment on a ground not previously raised[, this Court] will rarely consider such an argument."); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (same).

Respondent switches horses mid-course, however, for good reason. This Court's long-held view of the Petition Clause does not grant him the remedy he seeks. Although it may offer lawsuits some protection as petitions, it does not grant public employees the near absolute protection respondent wants. His new access-to-courts theory offers more protection, to be sure, but only to those lawsuits involving "fundamental rights." Compare *Boddie* v. *Connecticut*, 401 U.S. 371, 383 (1971) (finding right of access to courts allows an indigent, who cannot afford to pay court filing fees, to petition for divorce because marriage is a "fundamental human relationship" and the marital union may be severed only by the government), with *United States* v. *Kras*, 409 U.S. 434 (1973) (refusing to extend right of access to courts to cover filing fees in bankruptcy proceedings), and *Ortwein* v. *Schwab*, 410 U.S. 656 (1973) (per curiam) (refusing to extend it to cover filing fees in post-hearing review of decision to reduce welfare benefits). And this Court has never interpreted that right so broadly as to protect

ordinary work-related complaints a public employee pursues through some official process. By arguing that the Petition Clause should encompass the right of access to courts, respondent hopes to leverage the greater stringency of review the latter applies to cases involving "fundamental rights" to the wide range of petitions the former covers. The Petition Clause does not support such a sweeping change, which would unsettle many areas of law, including those concerning court process. See pp. 19-21, *infra*.

Respondent's historical argument for placing the right of access to courts at the heart of the Petition Clause is quite weak. In an article extensively cited by both respondent and the ACLU, Resp. Br. v; ACLU Amicus Br. iv, Professor Carol Rice Andrews addresses these historical arguments, see Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557 (1999). Andrews notes that while some individuals, such as prisoners, have a substantive due process right to file civil suits, that right for the people at large was, at the time of her writing—only a decade ago—just "emerging" in Petition Clause jurisprudence. *Id.* at 557.

Although Andrews argues for finding a right of access to courts in the Petition Clause because "this new principle * * * can at least partially fill the gap left by the Court's [substantive] due process decisions," Andrews, *supra*, at 560, she candidly notes that "[t]he historical record offers little insight into the mere existence of a right to petition courts, let alone the proper contours of that purported right," *id.* at 561. "To be sure," she later writes, "the

right of access to courts under the Petition Clause is a 'new' constitutional precept," *id.* at 595, and quickly adds, "[u]nfortunately, there is a paucity of information to tell us whether the drafters of the First Amendment actually intended the Petition Clause to encompass civil court filings," *ibid.* As she summarizes the evidence with scholarly honesty,

> We can at least say that the history, text, and policies of the Clause are not inconsistent with an application of the right to petition to the courts. In other words, a plausible argument can be made that the Petition Clause does protect, at least to some degree, a person's right to file a civil lawsuit.

Ibid. Her caveats—"not inconsistent with," "a plausible argument," and "protect, at least *to some degree*"—undermine respondent's claim that the relevant history supports his peculiarly expansive view of the Petition Clause. Imagine the Framers' and Radical Republicans' reaction to the proposition that the Petition Clause limited the government's power to discipline public employees for any reason, let alone that it required federal courts to entertain every claim that an adverse action against a government employee was "really" based on his prior complaining activity.

Andrews, in fact, sees the Petition Clause's history much as petitioners do. She notes that "the new American states preserved the [petition] right, if at all, only as to the *legislature*," Andrews, *supra*, at 605, and that "at least Madison, and likely most of his contemporaries, understood the right to petition as part of the system by which the First Amendment

would guard the people's right to 'communicate their will' to their government," *id.* at 624 (quoting James Madison, House Debates (Aug. 15, 1789), *reprinted in* 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1096 (1971)). To her mind, the historical argument for applying the Petition Clause to court actions rests almost entirely on the belief that "in post-revolutionary America, a petition to the legislature was viewed as a fundamental right and served as a means of securing redress of private grievances. The 'right to petition' thus protected the right to present individual petitions [to legislatures] that *today* would constitute a civil action in court." *Id.* at 611 (emphasis added). In other words, the historical case for "the right of court access under the Petition Clause," *id.* at 625, turns on courts today handling some matters that legislatures used to.

This is slender support, indeed, for a broad right of access to courts under the Petition Clause, particularly one that would encompass, as respondent contends, arbitration and other alternative dispute resolution mechanisms that work entirely outside the court system and that the parties themselves have agreed through voluntary contract to have substitute for court process. That Congress or the federal government in 1789 might have settled some disputes that private arbitrators do today does not mean that complaints addressed to arbitrators constitute petitions. Indeed, all federal courts that have considered the issue have held that government facilitation, regulation, and enforcement of arbitration contracts do not constitute state action. See, *e.g.*, *Davis* v. *Prudential Sec., Inc.*, 59

F.3d 1186, 1190-1192 (11th Cir. 1995); see also Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1758 n.206 (2006) (collecting cases). Respondent's citation of *National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988), for the proposition that an arbitrator who hears grievances under a collective bargaining agreement with a public employer is "a government actor for constitutional purposes," Resp. Br. 56-57, is wide off the mark. In *Tarkanian*, this Court held that a party overseeing "enforcement proceedings * * * cannot be regarded as an agent of [the government]" if it acts "at odds with the State." 488 U.S. at 196. In other words, an arbitrator's "interest in the effective and evenhanded enforcement of [contractual terms]" does not transform her into a state actor. *Ibid.*

Professor Andrews also honestly describes the dangers creating this new right under the Petition Clause could pose. As she puts it, recognizing this new guarantee

> could wreak havoc upon the very courts it purports to protect by calling into question the system by which courts operate. First Amendment rights are "supremely precious" freedoms and are subject to heightened protection. An undefined right of judicial access under the First Amendment could call into question any law that purports to limit or regulate civil filings, including existing rules of procedure.

Andrews, *supra*, at 560 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)) (footnote omitted). Embracing the "right to litigate" as part of the right to petition would raise several troubling issues. Just to start, are sovereign immunity barriers to lawsuits an unconstitutional burden on petition rights, as at least one article cited by both respondent and the ACLU argues? See Resp. Br. 32 n.31, 44 n.38, 52 & n.42 (citing James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899 (1997)); ACLU Amicus Br. 12 (same). Are Rule 11 sanctions for filing a lawsuit for "any improper purpose, such as to harass," Fed. R. Civ. P. 11(b)(1), unconstitutional, as Professor Andrews herself argues in another article, see Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665, 796 (2000) ("Federal Rule 11(b)(1) * * * violate[s] the First Amendment.")? Are federal and state statutes barring lawsuits brought solely for vexatious or otherwise improper motives similarly unconstitutional, as Professor Andrews also argues, *id.* at 797-800 ("[T]o the extent that the court relies on motive to curb access, [doing so] is invalid."), despite the considered judgments of state legislatures that such litigation frequently runs afoul of numerous societal interests and compromises the integrity of the courts? Are Rule 11 sanctions for filing a suit without "inquiry reasonable under the circumstances," Fed. R. Civ. P. 11(b), unconstitutional, at least when filed against the government, as a note in the Harvard Law

Review argues? See Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 Harv. L. Rev. 1111, 1124-1127 (1993). Do individuals enjoy a constitutional right to appeal in civil cases since the courts of appeals are, after all, as much a part of "the government" as the trial courts? Do individuals have a right under the Petition Clause for judicial review of any government action that causes them a grievance? These are just a few of the questions that adopting respondent's view of the Petition Clause would raise.

Respondent argues that petitioners improperly attempt to limit the protection of the Petition Clause to its "core," *e.g.*, Resp. Br. 35-40. That is not accurate. Petitioners contend merely that the Petition Clause offers no cause of action to a public employee disgruntled in his job unless the action is grounded on a matter of public concern. Pet. Br. 58. It is certainly true, however, that respondent does not seek to ground the Petition Clause in its core. Rather, he seeks to invert its core and periphery. He sees a Petition Clause largely defined by a right of access to courts or, as one amicus honestly puts it, a "right to litigate," AFL-CIO Amicus Br. 8. Indeed, he believes the clause covers any action in which "the employee may be represented by an attorney," Resp. Br. 60, but curiously not a traditional petition to the legislature, unless, of course, the employee hires an attorney to write it, see *id.* at 59-60 (delimiting three types of cognizable public employee petitions, none of which appears to cover an employee petitioning the legislature unless the legislature has the power to rehire or set the terms

and conditions of employment of individual employees).

Such a litigation-centric view not only favors petitions over similar speech but also favors some petitions—those involving litigation broadly conceived—over all others. Respondent offers no historical evidence that the Petition Clause warrants that. His difficulty shows, moreover, the line-drawing problems that this Court would face if it goes down his road. It will have to distinguish not only between petitions and speech, an enterprise fraught with difficulty, see Pet. Br. 29-34, but also among different types of petitions to separate those worthy of more from those worthy of less protection.

V. THIS COURT CAN ITSELF DECIDE WHETHER RESPONDENT'S PETITIONING IMPLICATES A MATTER OF PUBLIC CONCERN

Because courts within the Third Circuit understand that not applying *Connick*'s public concern requirement to petitions necessarily entails not applying any form of *Pickering* balancing to them, see pp. 5-6, *supra*, no court has yet considered whether respondent's underlying complaints involve any matter of public concern. Thus, a vacatur and remand for such a determination is not inappropriate. That issue, however, "is one of law, not fact," *Connick* v. *Myers*, 461 U.S. 138, 148 n.7 (1983), which this Court can determine, if it wishes, from examining "the content, form, and context of [the petition], as revealed by the whole record," *id.* at 147-148. In making this determination in *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam),

this Court acted summarily after holding that the "cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of [expression]." *id.* at 83-84.

Under this controlling standard, respondent's petitioning involves no matter of public concern. Like the questionnaire in *Connick*, respondent's initial grievance and lawsuit, "if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo." *Connick*, 461 U.S. at 148. The district court held that petitioners had retaliated against respondent by issuing the directives and withholding overtime. Pet. App. 17a-18a. The Third Circuit upheld those holdings. *Id.* at 15a. As the jury instructions make clear, the first act was tied exclusively to respondent's initial grievance; the second exclusively to his lawsuit. C.A. App. A00770. Both the lawsuit and initial grievance, however, ultimately rest on the same dispute: whether the Borough's decision on February 7, 2003 to terminate respondent's employment was for "just cause." J.A. 14. As the arbitrator's report makes clear, that underlying dispute involved no matter of public concern. J.A. 13-38. His summary of the issues in his final holding shows only work-related conflicts, although admittedly serious ones:

> The evidence shows that Mr. Guarnieri was guilty of using tactics to evade, if not defy, the authority of Borough Council can [sic] of attempting to intimidate Council members.

> Certainly his conduct deserved discipline. Mr. Guarnieri had received three written reprimands, with the first two correcting the specified unacceptable behavior. No major violation occurred between the last reprimand and the termination action. Council has every right to expect any Chief of Police to follow its policies and directives and to abide by budget constraints. At the same time, Council must confront unacceptable conduct when it occurs and utilize discipline in a manner that conveys to employees its expectations and the consequences of not doing so. For the most part that was not done in this case. Moreover, in initiating and completing the termination, Council committed significant procedural errors, which further weakened the Borough's position. Mr. Guarnieri's behavior cannot be condoned and is worthy of discipline, but the Borough has failed to prove it had just cause for its decision to discharge Mr. Guarnieri on February 7, 2003.

J.A. 37-38. This Court itself can easily determine that respondent has failed to satisfy *Connick*'s public concern requirement.

CONCLUSION

The decision below should be vacated and the case remanded for proceedings consistent with an opinion holding that public employees cannot sue their employers for retaliation under the Petition Clause unless their petitions involved matters of public concern. This Court itself may, if it wishes,

determine that respondent's petitioning involves no such matters.

Respectfully submitted.

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No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, ET AL.,
PETITIONERS

v.

CHARLES J. GUARNIERI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment protects a public employee from disciplinary action by his employer for petitioning the government on matters of purely private concern.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment protects a public employee from disciplinary action by his employer for petitioning the government on matters of purely private concern. Because it is the nation's largest public employer, the United States has a substantial interest in the proper resolution of that question.

STATEMENT

1. In February 2003, the Duryea Borough Council, a local government entity in Pennsylvania, dismissed respondent from his position as chief of police. Pet. App. 4a, 57a. Respondent subsequently filed a union griev-

ance that challenged his termination. *Ibid.* Two years later, after an arbitration, respondent was reinstated as police chief. *Ibid.* Upon his return, the Council issued 11 directives to respondent, which provided instructions for carrying out his duties as police chief. *Id.* at 4a, 57a-59a.[1] In response, respondent filed a second union grievance, which led to another arbitration. *Id.* at 4a, 59a. The arbitrator ultimately directed the Council to modify or abandon some of the directives. *Ibid.*

Respondent also sued petitioners under 42 U.S.C. 1983, alleging, among other things, that petitioners had retaliated against him for having filed the initial grievance challenging his dismissal, thereby infringing his First Amendment right to petition the government. Pet. App. 4a-5a. Respondent's First Amendment retaliation claim rested largely on the issuance of the directives, but he later amended his complaint to include a subsequent denial of $338 in overtime pay as another retaliatory act. *Id.* at 5a.[2]

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[1] The directives provided that respondent: (1) should work no more than eight hours per day; (2) could attend Borough Council meetings as a private citizen, but would not be paid for attending the meetings as police chief; (3) should follow the purchase order system; (4) should ensure that the day shift officer observes arrival and dismissal of students at the Holy Rosary School; (5) should patrol for four to five hours of his shift; (6) should follow instructions relayed to him by the Borough solicitor; (7) should provide a weekly report of his activities to the Borough secretary; (8) should provide the Borough secretary with a monthly police department schedule; (9) could use the police car only for official business; (10) should enforce a municipal no-smoking rule within the police department; and (11) would work the 7 a.m. to 3 p.m. day shift. Pet. App. 57a-59a.

[2] Although the court of appeals stated that the amount at issue was $338, petitioners note that the actual amount in dispute was only $284,

2. a. Petitioners moved for summary judgment. The district court granted the motion in part, but denied summary judgment on respondent's Petition Clause retaliation claim. Pet. App. 55a-93a. The district court acknowledged that under this Court's precedent, when a public employee exercises his right to free speech, the First Amendment does not protect him from disciplinary action by his employer unless the speech addressed a matter of public concern. *Id.* at 76a (citing *Connick* v. *Myers*, 461 U.S. 138, 147 (1983)). Relying on the Third Circuit's decision in *San Filippo* v. *Bongiovanni*, 30 F.3d 424 (1994), cert. denied, 513 U.S. 1082 (1995), however, the district court held that when a public employee files a formal grievance pursuant to the Petition Clause, that action "is protected [by the First Amendment] without regard to whether the petition addresses a matter of public concern." Pet. App. 79a.

b. In *San Filippo*, a university professor filed a suit under 42 U.S.C. 1983 in which he alleged that he had been dismissed in retaliation for, among other things, having filed various grievances and lawsuits. A divided court of appeals held that, inasmuch as the plaintiff's "expressive conduct" included "activities that implicate the petition clause, rather than the free speech clause, of the first amendment," those activities were protected regardless of whether they addressed a matter of public concern. 30 F.3d at 434-435; see *id.* at 434-443; cf. *Connick*, 461 U.S. at 147. Although the court acknowledged that every other court of appeals to consider the issue had reached a contrary conclusion, it concluded that a public employee's lawsuit or grievance "of the sort that

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because $54 of the claim was for overtime requested by another employee. See Pet. Br. 8 n.4 (citing C.A. App. A00678, A00821).

constitutes a 'petition' within the meaning of the first amendment" enjoys categorical constitutional protection. *San Filippo*, 30 F.3d at 441-442. The court reasoned that "[i]f government could, *qua* employer, freely discharge an employee for the reason that the employee, in order to present a non-sham claim against the government-employer, invoked * * * a mechanism [that the government created], the petition clause of the first amendment would, for public employees seeking to vindicate their employee interests, be a trap for the unwary—and a dead letter." *Id.* at 442. The court further reasoned that "the right to petition has a pedigree independent of—and substantially more ancient—than the freedoms of speech and press," and that "[t]here is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago." *Id.* at 443.

Judge Becker dissented. In his view, the court of appeals' logic "pale[d] by comparison with the reasoning of the other circuits and with the inexorable logic of *McDonald* v. *Smith*, 472 U.S. 479 (1985)," which held that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *San Filippo*, 30 F.3d at 449 (Becker, J., dissenting). He further opined that the decision was "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined." *Ibid.*

c. After a trial, the jury found that issuance of the employment directives and withholding of $838 in overtime pay constituted retaliation for protected First Amendment activity and awarded compensatory and punitive damages. Pet. App. 5a, 17a-18a. The district

court denied petitioners' motion for judgment as a matter of law and for a new trial. *Id.* at 16a-34a. Again relying on *San Filippo*, the court rejected petitioners' argument that they were entitled to judgment as a matter of law because respondent's petition did not address a matter of public concern. *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 1a-15a. Like the district court, the court of appeals held that petitioners' argument that "the First Amendment does not protect government employees from retaliation for the filing of petitions unless they address matters of public concern," *id.* at 7a, was foreclosed by the court of appeals' prior holding in *San Filippo*, *id.* at 8a-9a.

SUMMARY OF ARGUMENT

When the government acts as employer, its interests in regulating speech are far different than when it regulates the speech of the general public. It is well settled that the government does not violate the First Amendment by disciplining a public employee based on speech that does not involve a matter of public concern to the community. There is no basis for a different result in cases where a public employee petitions the government about a purely private matter.

A. Public employees do not relinquish all First Amendment rights when they accept employment with the government. Nevertheless, this Court has long recognized that when a public employee's expressive conduct does not implicate the basic concerns of the First Amendment, the employee's claimed right of expression must give way to the government's interests in efficient provision of public services. In the First Amendment context, the Court has identified as the "basic concern" of the First Amendment the assurance of an "unfettered

interchange of ideas for the bringing about of political and social change desired by the people." *Connick* v. *Myers*, 461 U.S. 138, 144-145 (1983). When a public employee's expression does not involve a matter of public concern, the employee is not protected from disciplinary action by the First Amendment.

This rule reflects this Court's recognition that the claimed constitutional rights of public employees must be considered in light of the government's interest in carrying out its function as a public employer. The government has a strong interest in promoting the efficiency of the public services that it performs through its employees. Private employment grievances brought by public employees do not implicate the basic concerns of the First Amendment, and the employee's interests therefore must give way to the government's need to efficiently perform its duties. Allowing First Amendment claims based on private employee grievances like those at issue here would constitutionalize the grievance process for public employees and make the federal courts arbiters of government employment disputes, a result this Court has refused to tolerate.

B. The court of appeals' extension of First Amendment protection to private grievances filed by public employees is not justified by any difference between the Speech Clause and the Petition Clause. To the contrary, this Court has held that "First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). There is no reason for analyzing union grievances, arbitrations, or lawsuits differently.

The court of appeals' concern that refusing to afford First Amendment protection to public employee petitions would undermine the historical importance of the Petition Clause ignores this Court's careful preservation of the core rights of public employees as citizens in its public employment cases. Moreover, the court's concern that denying First Amendment protection to public employees for their invocation of formal remedial mechanisms would undermine the effectiveness of those mechanisms overlooks the alternative avenues under federal and state law for protecting workers' access to available remedies.

The court of appeals' decision is also unjustified by any difference in the balance of interests when public employee speech takes the form of a petition. In fact, expression through a petition may be more disruptive to the government's operations than expression through informal speech, because the government must expend time and resources responding to First Amendment-based grievances. Extending First Amendment protection to everyday employment grievances brought by public employees would also expand the constitutional rights of government workers far beyond those rights enjoyed by employees in the private sector, and it would create an anomalous distinction between employees who, perhaps fortuitously, express their private concerns in the form of a grievance and those who voice their concerns through other means.

ARGUMENT

THE PETITION CLAUSE OF THE FIRST AMENDMENT DOES NOT SHIELD PUBLIC EMPLOYEES FROM DISCIPLINARY ACTION WHEN THEY PETITION THE GOVERNMENT ON MATTERS NOT OF PUBLIC CONCERN

It is well established that "the government as employer * * * has far broader powers than does the government as sovereign." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). In the context of freedom of speech, this Court has long recognized that the government's interests as an employer in regulating the expression of ideas by its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). The Court has accordingly made clear that, although the First Amendment protects "the rights of public employees to participate in public affairs," it does not prohibit the government from disciplining its employees based on their expression of views on purely private matters. *Connick* v. *Myers*, 461 U.S. 138, 144-147 (1983). With respect to the public employment context, therefore, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials * * * enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.

Contrary to the holdings of every other court of appeals to have considered the issue,[3] the court of appeals

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[3] *See Tang* v. *Department of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998); *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1063

in this case held that when a public employee's expression implicates another right guaranteed by the First Amendment—namely, the right to petition the government for the redress of grievances—the First Amendment shields the employee from disciplinary action regardless of whether the employee's petition relates to a matter of public concern. That holding is wrong. A public employee is entitled to no greater First Amendment protection when he files a petition for the redress of grievances than he possesses when he engages in other forms of First Amendment expression. The Petition Clause, like the Speech Clause, protects a public employee from disciplinary action imposed by his employer only if he petitions the government about a matter of public concern.

A. The First Amendment Does Not Protect Public Employees From Disciplinary Action Based On Speech About Matters Of Purely Private Interest

The First Amendment protects public employees from disciplinary action based on their speech only when that speech involves a matter of public concern. That

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1059 (2d Cir.), cert. denied, 510 U.S. 865 (1993); *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009); *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989); *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir.), cert. denied, 553 U.S. 1033 (2008); *Bell v. Town of Wisconsin*, 568 F.2d 1258, 1262 (7th Cir. 1980); *Gustafson v. Morrison*, 497 F.3d 868, 872 (8th Cir. 2007); *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220-1221 (9th Cir. 1997), cert. denied, 524 U.S. 902 (1998); *Martin v. City of Del City*, 179 F.3d 882, 887-888 (10th Cir. 1999); *D'Angelo v. School Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007); see also *Pratt v. Ottum*, 761 A.2d 313, 321 (Me. 2000); *Harris v. Mississippi Valley State Univ.*, 873 So. 2d 970, 984 (Miss. 2004); *McDowell v. Napolitano*, 886 P.2d 218, 225-226 (N.M. 1994); *Smith v. Bates Technical Coll.*, 991 P.2d 1135, 1145-1147 (Wash. 2000).

rule preserves the core purpose of the First Amendment, and protects the interest of the government in efficiently running its offices and agencies.

1. This Court has consistently recognized that "there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist*, 553 U.S. at 598 (quoting *Cafeteria & Rest. Workers, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961)) (brackets in original). In the context of public employment in particular, this Court has made clear that "'constitutional review of government employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign.'" *Id.* at 599 (citation omitted).

2. As interpreted for most of the nation's history, the First Amendment placed no limitation on a public employer's ability to make personnel decisions on the basis of an employee's expression. The First Amendment was thought to apply when the government acted as sovereign with respect to citizens, but not when it acted as employer with respect to employees. "The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: '[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Connick*, 461 U.S. at 143-144 (quoting *McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892)) (brackets in original); see *id.* at 144 (citing decisions from first half of twentieth century).

The Court modified its view, however, in "a series of cases arising from the widespread efforts in the 1950's

and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144; see *ibid.* (citing cases). In those cases, the Court invalidated statutes and actions that conditioned public employment on general oaths of loyalty and the disclosure of private associations, thereby "suppress[ing] the right of public employees to participate in public affairs." *Id.* at 144-145. Those decisions reflected the Court's understanding that the First Amendment accords special protection against "threats to the right of citizens to participate in political affairs." *Id.* at 145; see *ibid.* ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citation omitted).

The Court's decision in *Pickering*, *supra*, "followed from this understanding of the First Amendment." *Connick*, 461 U.S. at 145. The plaintiff in *Pickering* was a public-school teacher who was fired for writing a letter to a newspaper that criticized the way the school board had attempted to raise revenue. In upholding the teacher's First Amendment claim, this Court said that, insofar as the lower court had concluded that public-school teachers "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools," the decision rested on a premise that has been rejected by the Court. *Pickering*, 391 U.S. at 568. At the same time, the Court recognized that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regula-

tion of the speech of the citizenry in general." *Ibid.* To resolve a First Amendment claim in a case of this type, the Court said, it is thus necessary to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern" and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

Fifteen years after *Pickering*, in *Connick*, this Court "return[ed] to th[e] problem" of striking a balance between the interests of a public employee and those of a public employer. 461 U.S. at 140. In rejecting the First Amendment claim in *Connick*, the Court explained that "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental." *Id.* at 143. That language, the Court said, "reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Ibid.* Thus, when a public employee is not speaking "as a citizen upon matters of public concern," his First Amendment claim should be rejected without any balancing of the interests of the employee and the employer. *Id.* at 147. This Court's responsibility, *Connick* makes clear, is merely to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Ibid.*

The plaintiff in *Connick* was an assistant district attorney who was told she would be transferred and then circulated a questionnaire soliciting the views of her colleagues on office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. She was fired as a result.

The Court held that, with one exception,[4] the questions in the questionnaire were "mere extensions" of the plaintiff's "dispute over her transfer," and thus did not "fall under the rubric of matters of 'public concern.'" 461 U.S. at 148. Because the questions did not address a matter of public concern, the Court found it "unnecessary * * * to scrutinize the reasons for [the plaintiff's] discharge." *Id.* at 146.

3. The rule articulated in *Connick* reflects this Court's recognition that public employees' assertion of First Amendment rights must be considered in light of "the realities of the employment context." *Engquist*, 553 U.S. at 600. As this Court explained in *Connick*:

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

461 U.S. at 151 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)); see also *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006) ("Government

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[4] The one question that did touch on a matter of public concern, in the Court's view, was whether assistant district attorneys ever felt pressured to work in political campaigns. The Court thus went on to balance the employee's interest in commenting on that matter against her employer's interest in workplace efficiency. Striking the balance in favor of the employer, the Court deferred to the district attorney's judgment that the questionnaire was "an act of insubordination which interfered with working relationships." *Connick*, 461 U.S. at 151.

employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

The *Connick* rule strikes an appropriate balance between those practical realities and the rights of public employees by asking "whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist*, 553 U.S. at 600. In the context of the First Amendment rights of expression, whose basic concern is to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Connick*, 461 U.S. 144-145, an employee's asserted First Amendment right must "give way" to the government's interest as an employer unless the right concerns the employee's right as a citizen to participate in public affairs.

While the Court's "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government," the First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Connick*, 461 U.S. at 147. The Court has repeatedly admonished that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." *Id.* at 147; see *Garcetti*, 547 U.S. at 420 ("Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'") (citing *Connick*, 461 U.S. at 154); *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976) ("[F]ederal court is not

the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."). Applying *Connick*'s public concern requirement to a public employee's expressive activities prevents this unwarranted result, and protects the careful balance achieved in this Court's public employment cases between the interests of public employees and the government's need to efficiently perform its duties.

B. The Public-Concern Requirement Applies To Petitions For The Redress Of Grievances As It Applies To Other Forms Of Employee Expression

The court of appeals in this case did not question the general principle that the First Amendment protects an employee from disciplinary action based on his speech only if that speech was expressed as a citizen on a matter of public concern. Relying on its earlier decision in *San Filippo*, however, the court held that the First Amendment protected respondent from disciplinary action based on his expression, regardless of whether it concerned a matter of public concern, because that expression took the form of a union grievance. Pet. App. 8a-9a. If that result is to be reconciled with this Court's cases, it must be based on some relevant distinction between the First Amendment right of free speech and the right to petition the government. No such distinction exists.

1. The Petition Clause of the First Amendment protects "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. Amend I. Like the other rights provided by the text of the First Amendment, "[t]he right to petition * * * is an assurance of a particular freedom of expression." *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985).

This Court has never intimated that the right to petition the government is entitled to greater protection than any other right secured by the First Amendment. To the contrary, this Court has repeatedly stated that "[a]lthough the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte* v. *United States*, 470 U.S. 598, 610 n.11 (1985).

In *McDonald*, the Court rejected the petitioner's argument that the Petition Clause provided absolute immunity in a libel action concerning letters he had written to the President of the United States about a potential candidate for United States Attorney. The Court explained that accepting the petitioner's libel defense "would elevate the Petition Clause to special First Amendment status." 472 U.S. at 485. In refusing to do so, the Court explained that the Petition Clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," and that "[t]hese "First Amendment rights are inseparable." *Ibid.* The Court concluded that "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Ibid.*; see *id.* at 488-489 (Brennan, J., concurring) (stating that distinguishing between the Free Speech and the Petition Clauses is "untenable," and that "[t]he Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its sovereign authority"); see also *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for

redress of grievances. All these though not identical, are inseparable. They are cognate rights, and therefore are united in the First [Amendment's] assurance.").

Respondent has attempted to reconcile the court of appeals' decision in this case with *McDonald* by emphasizing that the court of appeals' rule applies to a kind of petition not at issue in *McDonald*—namely, petitions that take the form of lawsuits or invocations of similar formal remedial mechanisms. Br. in Opp. 8-12, 27. The court of appeals' protection for such petitions, respondent notes, is "expressly rooted in this Court's repeated decisions that the Petition Clause guarantees access to the courts." *Id.* at 9; see *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972) (identifying access to the courts as one aspect of the right to petition).[5] But nothing in this Court's cases suggests that a petition implicating the right of access to the courts warrants greater First Amendment protection than any other type of petition. And while a public employee's exercise of the right to seek judicial redress of grievances certainly may implicate matters of public concern, see, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 429-430 (1963) (concluding that litigation by NAACP is "a form of political expression" because it is "not a tech-

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[5] Although this Court's cases make clear that the right of access to the courts is one aspect of the right to petition, historical evidence suggests that the central purpose of the Petition Clause was access to the legislature. See 1 Annals of Cong. 738 (1789) (James Madison explaining during congressional debate on the First Amendment that the Petition Clause ensures that people "may communicate their will" through direct petitions to the legislature and government officials); see also 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1028 (1971) (stating that Petition Clause was designed to protect the peoples' right to apply "to the Legislature by petitions, or remonstrances, for redress of their grievances").

nique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment"), that will not invariably be so. Formal remedial mechanisms exist for the resolution of a wide variety of disputes, including disputes about terms and conditions of employment unrelated to "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 147.

2. The court of appeals in *San Filippo* identified two bases for distinguishing between the Speech Clause and the Petition Clause in the context of retaliation claims brought by public employees. Neither is persuasive.

First, the court of appeals cited the distinct origins of the Petition Clause as justification for special treatment of the right to petition. Tracing the right to petition to "the Bill of Rights exacted of William and Mary," the court emphasized that Parliament provided that "all committments [*sic*] and prosecutions for such petitioning are illegal." *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994) (citations omitted; brackets in original), cert. denied, 513 U.S. 1082 (1995). The court concluded that "[t]here is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago." *Ibid.*

The court of appeals' emphasis on the historical significance of the Petition Clause ignores this Court's repeated observations that the Petition Clause was "cut from the same cloth as the other guarantees of [the First] Amendment," and that those guarantees are not subject to a constitutional hierarchy. *McDonald*, 472 U.S. at 482. Limiting First Amendment protection to matters of public concern in the public employment context would not, in any event, mean that the Petition Clause "mean[s] less today" than it did before the ratifi-

cation of the Bill of Rights. The rule articulated in *Connick* protects the "basic concerns" of the First Amendment, but recognizes that the Constitution does not apply in the same way when the government acts in the employment context (as opposed to as a sovereign) due to "the requirements of the government as employer." *Engquist*, 553 U.S. at 600.

Second, the *San Filippo* court stated that the Petition Clause would become a "trap for the unwary" or "a dead letter" if the government could discipline an employee who uses mechanisms that the government itself has created for the filing of grievances. 30 F.3d at 442. The concerns articulated by the court of appeals are wrong, as illustrated by the facts of this case. Respondent used the methods available to him to present his personal grievances to his employer, and he was successful at every turn. He filed a grievance challenging his dismissal, which resulted in his reinstatement. Pet. App. 4a, 57a. He filed a second grievance challenging the directives issued to him by the Council, which resulted in modification of some of the directives. *Id.* at 4a, 57a-59a. And when the Council subsequently refused to authorize $338 in overtime pay, respondent sought redress through the Department of Labor and the Council was ordered to pay him the overtime. *Id.* at 5a. As a general matter, as respondent himself has noted, "the retaliatory practices at issue" in *San Filippo* and subsequent cases "are often forbidden by state or federal law in order to safeguard those very mechanisms, and thus are already unavailable to the state and local employers at issue." Br. in Opp. 22. Placing a public concern limitation on the *constitutional* protection afforded to public employees who petition the government neither permits retaliation that is already forbidden by state or local

law, nor does it prevent state or local legislatures from enacting such laws. Rather, the public concern limitation simply ensures that these private employment disputes like the one in this case are not litigated in federal court as constitutional disputes.

3. In any event, whatever distinctions the court of appeals might have discerned between petitions and other forms of expression, the practical concerns underlying the rule articulated in *Connick* remain the same. To the extent that a public employee's expression threatens to disrupt the effective management of the government's offices and agencies, see *Connick*, 461 U.S. at 151, that expression is no less disruptive because it takes the form of a written grievance or lawsuit. Indeed, as Judge Becker noted in dissent in *Saw Filippo*, filing of a formal grievance may be more disruptive than speech, because expression through a lawsuit "still reache[s] the public (lawsuits, for example, are matters of public record) and, in addition, compel[s] the [government employer] to respond to the lawsuit and grievances." 30 F.3d at 449-450 (Becker, J., dissenting).

Moreover, to hold that the First Amendment categorically shields employees from discipline based on their private employment grievances would extend the rights of public employees far beyond those enjoyed by their privately employed counterparts. A private employer could certainly issue a set of job-related employment directives to a previously fired employee, or decide that overtime pay was unauthorized, without raising First Amendment concerns. If the employer's decision was unlawful under, for example, state or federal labor laws, the employee could seek redress through appropriate administrative or judicial channels. And indeed, respondent took advantage of just such procedures in

this case. See p. 19, *supra*. Respondent's status as a public employee should not allow him to take the *additional* step of suing his employer for damages under 42 U.S.C. 1983 for actions that he perceives as retaliatory or unfair, and to seek attorney's fees under 42 U.S.C. 1988 should he prevail. Such a rule places public employees in a far better position than private sector workers, effectively affording public employees a "First Amendment right to dictate to the state how they will do their jobs." *Urofsky* v. *Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001).

Dispensing with the public concern requirement in this context would also create an anomalous distinction between employees who express their private concerns in the form of a formal grievance and those who voice their concerns by other means. See *San Filippo*, 30 F.3d at 449 (Becker, J., dissenting) (stating that majority opinion was "an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined"). As other circuits have acknowledged, "special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form." *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988); accord *Hoffmann* v. *Mayor, Councilmen & Citizens of Liberty*, 905 F.2d 229, 234 (8th Cir. 1990); *Day* v. *South Park Indep. Sch. Dist.*, 768 F.2d 696, 703 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986). The special status afforded to the Petition Clause by the court of appeals elevates form over substance, and the result is unjustified by any distinction between those forms of expression.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Pennsylvania is one of its state affiliates. Since its founding in 1920, the ACLU has participated in numerous cases before this Court involving First Amendment issues, including *McDonald* v. *Smith*, 472 U.S. 479 (1985), as direct counsel and as *amicus curiae*. The proper resolution of this case is therefore a matter of significant concern to the ACLU and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In February 2003, the Duryea Borough Council fired respondent Charles Guarnieri from his position as chief of police. Pet. App. 4a, 57a. Guarnieri filed a grievance challenging his termination and the arbitrator ordered that he be reinstated. *Id.* When Guarnieri returned to work, the Borough Council issued a set of directives concerning Guarnieri's performance of his duties as police chief. *Id.* at 4a, 57a-59a. After another proceeding, the arbitrator ordered the Council to modify or delete some of the directives. *Id.* at 4a, 59a-60a.

In July 2005, Guarnieri filed suit against the Borough, alleging that it had retaliated against him

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[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have filed general consents to the filing of briefs *amicus curiae* with the Clerk.

for challenging his termination through the collective bargaining agreement's grievance and arbitration process. Pet. App. 4a-5a. That process is authorized by and enforceable under state law. See Police and Fireman Collective Bargaining Act ("Act 111"), 43 Pa. Stat. Ann. §§ 217.1-.10, 211.6; *Pa. State Police* v. *Pa. Troopers Ass'n*, 741 A.2d 1248 (Pa. 1999). After Guarnieri filed this lawsuit, the Borough wrongly denied him overtime and then refused to pay the overtime despite a Department of Labor decision requiring it to do so. Joint Appendix ("J.A.") 109-10. Guarnieri thus amended his federal complaint to allege that the Borough had also retaliated against him for filing the instant lawsuit. *Id.* at 100.

If a citizen of the Borough of Duryea were to file a judicial or administrative complaint against the Borough – including a complaint about a matter of private rather than public concern – any Borough retaliation for that filing would violate the petition clause of the First Amendment of the United States Constitution. See *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("[t]he right of access to the courts is indeed but one aspect of the right of petition"); *id.* at 511 (petition right includes complaints "respecting resolution of . . . business and economic interests"). The question presented in this case is whether the "realities of the employment context," *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008), somehow outweigh "the basic concerns of the [petition clause]," *id.*, and require this Court to deny citizens who are also public employees their constitutional right to invoke the state's adjudicatory processes to address private matters, including employment-related complaints. The answer to that question is no.

Public employees do not forfeit constitutional rights, including the First Amendment right to petition the government for redress of grievances, by accepting public employment. See *Smith* v. *Ark. State Highway Emps.*, 441 U.S. 463, 465 (1979) (per curiam) (citing *Pickering* v. *Bd. Of Educ.*, 391 U.S. 563, 574-75 (1968)). Instead, they are presumed to retain those rights, particularly where "the asserted employee right implicates the basic concerns of the relevant constitutional provision," unless the government demonstrates that its interests in operating an efficient workplace justify specific limits on public employees' rights. *Engquist*, 553 U.S. at 600.

This case involves a core concern of the First Amendment's right of petition – the right of access to the state's adjudicatory processes. The exercise of this aspect of the right of petition implicates not only the petition clause, but also the due process clauses of the Fifth and Fourteenth Amendments and the privileges and immunities clause of Article IV of the Constitution. See *Tennessee* v. *Lane*, 541 U.S. 509, 518, 523 (2004). By virtue of these constitutional provisions, "'going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer.'" *Bill Johnson's Rests.* v. *NLRB*, 461 U.S. 731, 741 (1983). "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers* v. *Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907). Allowing the government to punish a public employee for invoking the state's own adjudicatory mechanisms clearly "implicates the basic concerns of" the right of petition. *Engquist*, 553 U.S. at 600.

That is why *McDonald* v. *Smith*, 472 U.S. 479 (1985), does not decide this case. *McDonald* involved a component of the petition right that is virtually identical to the free-speech right. There were no constitutional or practical concerns that made it inappropriate for the Court to apply its libel and defamation limits on the free-speech right to the exercise of the petition right at issue. Because Guarnieri invoked the state's adjudicatory processes, however, his exercise of the petition right involves constitutional and practical concerns that make it wholly inappropriate to apply *Connick* v. *Myers*' public-interest prerequisite to the protection of public-employee free speech. See 461 U.S. 138, 147 (1983). Those distinct concerns include the effectiveness and integrity of the state's prescribed processes for the neutral adjudication of disputes, the public interest in and general applicability of the legal outcomes of those state processes, and the absence of any true operational interest in retaliating against employees who use the processes that state law instructs them to use. This Court thus must conduct a different balancing process specific to the petition right and free-speech limitations at issue here.

When the Court does so, it should conclude both that this case involves the "basic concerns" of the petition right and that the "realities of the employment context" do not require that public employees forfeit the right to invoke the state's adjudicatory processes for resolution of their allegedly private complaints. There is no background principle of law or presumption that employers are authorized to retaliate against employees who call upon the state's adjudicatory processes. The opposite is true. Federal and state laws generally forbid

employers to retaliate against employees for filing formal complaints about work-related wrongs. This virtual unanimity exists because such retaliation deeply undermines the purpose and effect of an adjudicatory system. In fact, such reprisal is fundamentally inconsistent with a law establishing an adjudicatory system. Employers do not have – or need – the power to retaliate against employees who file formal workplace-related complaints in order to "effectively and efficiently" operate the workplace. *Waters* v. *Churchill*, 511 U.S. 661, 671-72, 674-75 (1994) (plurality opinion).

Indeed, this Court has already held that private employers and employees have a constitutional right to petition the government by invoking judicial and administrative processes to address private matters related to employer-employee relations, rejecting claims that the petition right is outweighed by other interests and concerns. See, *e.g.*, *Bill Johnson's Rests.*, 461 U.S. at 741; *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); *Bhd. of R.R. Trainmen* v. *Virginia*, 377 U.S. 1 (1964). In *Bill Johnson's Restaurants*, for example, this Court held that the employer's exercise of its constitutional right of access to the courts could not be condemned as an unfair labor practice, even when the object of the employer's suit was to prevent an employee from exercising a *federally-protected right*. 461 U.S. at 741. Fundamental fairness dictates that if an employer's right of access to the state's adjudicatory processes to address employment-related claims is so important that it cannot be limited even to protect a federal statutory right, then a public employee's right of access for the same purpose *cannot* be limited based on "the realities of the employment context." The decision below should be affirmed.

ARGUMENT

Public employees do not forfeit constitutional rights by accepting public employment. As explained in *O'Hare Truck Serv.* v. *City of Northlake*, 518 U.S. 712, 716-17 (1996):

> The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman "may have a constitutional right to talk politics . . . he has no constitutional right to be a policeman," *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892). A State may not condition public employment on an employee's exercise of his or her First Amendment rights. [*Id.* (citing *Keyishian* v. *Bd. of Regents*, 385 U.S. 589 (1967); *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593 (1972))].[2]

Thus, like all citizens, public employees have First Amendment rights, including the right to petition. See *Smith*, 441 U.S. at 465 ("the public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so").

Amici recognize that this Court has found that constitutional rights are not identical for public employees and persons acting as citizens. See, *e.g.*, *Engquist*, 553 U.S. at 599. Yet, in determining how constitutional rights apply differently to public employees, this Court has carefully engaged in

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[2] *See also Bd. of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-75 (1996) (collecting cases).

context-specific balancing, considering the nature of the constitutional right, the purposes it serves, and the government's interests as government and employer. *Id.* The product of that balancing here strongly favors recognition and enforcement of public employees' rights of access to the state's adjudicatory processes.

First, we examine the nature of the right of petition at issue and the purposes served by its invocation. This examination demonstrates that retaliation against a public employee for use of the state's adjudicatory processes strikes at the heart of the relevant petition clause concerns. Thereafter, we show that the reasons petitioners offer to justify extinguishing public employees' petition rights in these circumstances are plainly insufficient.

I. THE BASIC CONCERNS OF THE RIGHT OF PETITION ARE IMPLICATED WHEN THE STATE RETALIATES AGAINST AN EMPLOYEE FOR INVOKING THE STATE'S ADJUDICATORY PROCESSES.

Some aspects of the First Amendment's right of petition serve constitutional interests distinct from those served by the right of free speech. That is not surprising, considering that the petition right is textually separate from the right of free expression and is grounded in independent constitutional provisions. This case involves a particular aspect of the right of petition – the right to invoke the government's adjudicatory processes. See, *e.g.*, *Bill Johnson's Rests.*, 461 U.S. at 741 ("'going to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer'").

Guarnieri's argument is not – as petitioners would have it – that the petition right is older than or superior to the right of free speech, and thus deserves heightened respect and protection. It is instead that this aspect of the petition right – the right to invoke the state's adjudicatory processes – is of a different nature and protects different constitutional concerns than does the free-speech right. It emanates from both the First Amendment and the due process clauses. It protects access to state-prescribed processes and, unlike the free-speech right, is unrelated to the expressive content of the petition (the complaint or claim). It is never purely private, both because it invokes a process which may announce or apply the law in ways that govern the future conduct of others and because the public has a strong interest in the integrity and effectiveness of the state's processes, as well as their availability to all citizens. Here, the asserted employee right "implicates the basic concerns of" the access component of the petition clause. *Engquist*, 553 U.S. at 600. That distinguishes this case from *Connick* and *McDonald*, and mandates enforcement of the public employee's petition right.

A. The Petition Right Protects Access To The State's Adjudicatory Processes To Address Matters Of Private Concern.

1. This Court's decisions establish that the petition right of the First Amendment includes protection of access to the courts and other state adjudicatory processes. See, *e.g.*, *Cal. Motor Transp. Co.*, 404 U.S. at 513 (access to courts and administrative agencies "is part of the right of petition protected by the First Amendment"). Recently, in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), this Court characterized "this right to petition [the courts] as one of 'the most

precious of the liberties safeguarded by the Bill of Rights.'" *Id.* at 524-25 (quoting *United Mine Workers*, 389 U.S. at 222).

This Court has also recognized that the right of access to adjudicatory processes is protected by the Fifth and Fourteenth Amendments' due process clauses, see *Tennessee*, 541 U.S. at 523 ("[t]he Due Process Clause also requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings"); *Lewis* v. *Casey*, 518 U.S. 343, 362-63 (1996); *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985); *Boddie* v. *Connecticut*, 401 U.S. 371, 376-77 (1971); and is among the rights protected by the privileges and immunities clause of Article IV, see *Blake* v. *McClung*, 172 U.S. 239, 249 (1898) (privileges and immunities include the right "to institute and maintain actions of any kind in the courts of the state"). This right of access, with its many constitutional underpinnings, forbids governmental conduct that unduly obstructs persons who seek to present complaints to the state's adjudicatory authorities.

Significantly, this Court has also held that the right of access described above extends beyond matters of public concern to matters of private interest. In *California Motor Transport Co.*, 404 U.S. at 511, for example, a group of truckers alleged that a second trucker group was filing baseless, repetitive claims with judicial and administrative agencies to prevent the first group from obtaining operating rights. The Court held that the second group's right to file judicial and administrative claims was protected by the "right of access to the courts" which is "one aspect of the right of petition." *Id.* at 510. The defendants'

petition right included access to these adjudicatory forums even though their claims involved purely private economic matters. See also *Bill Johnson's Rests.*, 461 U.S. at 743 (petition right for employer suit against picketing employees for statements in leaflet alleged to be defamatory).

The Court confirmed the broad scope of the petition right in *United Mine Workers*, 389 U.S. at 221-22. It explained that "in *Trainmen*, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent, that the principles announced in [*NAACP* v.] *Button* were applicable only to litigation for political purposes." *Id.* at 223 (citation omitted). See also *Bhd. of R.R. Trainmen*, 377 U.S. at 7 ("[t]he State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.").

In sum, the access component of the petition clause serves a number of significant interests unrelated to the expressive content of the petition or complaint. It protects access to state-prescribed processes in which persons can seek redress for their grievances and receive "compensation for violated rights and interests" and "the psychological benefits of vindication [and the] public airing of disputed facts." *Bill Johnson's Rests.*, 461 U.S. at 743. The availability of a dispute resolution process that operates neutrally and dispenses justice is "the alternative of force," and thus "is the right conservative of all other rights." *Chambers*, 207 U.S. at 148. Indeed, the filing of claims in state-prescribed forums always implicates the public interest because

decisions in such matters may announce, interpret or apply law in ways that will affect future conduct and proceedings. All of the "basic concerns" of the petition clause are implicated when the state retaliates against employees for invoking state-prescribed adjudicatory processes.

2. Petitioners and their *amici* seek to obscure the significance of the access component of the petition right by claiming that the right was not primarily addressed to protection of access to the courts and other adjudicatory processes, but was instead focused on access to the legislature. See, *e.g.*, Pet. Br. 27; US Br. 17 n.5. This Court's decisions and the drafting history and English roots of the petition clause refute this claim.

This Court early on recognized the Constitution's solicitude for the right of access to judicial forums. In *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall explained that "[t]he 'very essence of civil liberty' certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . ." See also *Corfield* v. *Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.) (acknowledging the right "of a citizen of one state . . . to institute and maintain actions of any kind in the courts of the state").

The Court's understanding finds support in the drafting history of the petition clause. When James Madison submitted his first draft of the Bill of Rights to the First Congress in 1789, the proposed right to petition referred to the right to apply "'to the Legislature by petitions, or remonstrances, for redress of their grievances.'" 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 1026

(1971), *quoted in* Carol R. Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 613 (1999). Thereafter, a "Select Committee" of the House of Representatives altered the draft amendments and proposed a version of the right to petition that protected the right "to apply to the government for redress of grievances." House of Representatives Journal (Aug. 1789), *reprinted in* Schwartz, *supra* at 1122, *quoted in* C. Andrews, *supra* at 615. The Senate retained the language referring to petitioning "the government." Senate Journal (Aug.-Sept. 1789), *reprinted in* 2 Schwartz, *supra* at 1149, *quoted in* C. Andrews, *supra* at 618. This revision reflects the Founders' intent to extend the petition right to all three branches of the new federal government. See also James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 961-62 (1997).

Finally, the origins of the petition clause reveal the breadth of its protection. Most relevant here, that history reflects the proposition that the "right to petition" indisputably encompassed the invocation of processes for the adjudication of individual claims.

The clause has its roots in the English Bill of Rights of 1689, which itself was born of the 1688 trial known as the *Seven Bishops Case*, 12 Howell's State Trials 183 (1688). In that case, seven bishops were prosecuted because they lodged an allegedly seditious petition directly with the King. Significantly, during their trial, it appears to have been a point of agreement among the parties that individual petitions seeking relief from the King in his courts or in Parliament were fully protected and only the

prosecution of a public address to the King outside those bodies was at issue. See, *e.g.*, Eric Schnapper, *Libelous Petitions for Redress of Grievances*, 74 Iowa L. Rev. 303, 329-38 (1989) (describing consensus that petitions to courts were fully protected); cf. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2174 (1998) (a "petition was the beginning of an official action, part of a 'course of justice'").

The bishops were acquitted, and the English Bill of Rights that followed was intended to confirm the right of individuals to seek relief for legal injuries from the King directly, as well as through his courts or Parliament, and to forbid reprisals for the filing of such petitions in any forum. Thus, the Bill of Rights declared that "it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." 1 W. & M. 2d Sess., ch. 2, § 5 (Eng. 1689).[3]

In any event, the petition clause's protection of legislative petitions is wholly consistent with its concern for access to adjudicatory processes. In the England of the Glorious Revolution and in colonial America, citizens often petitioned the legislature to obtain adjudication or neutral resolution of private individual disputes. See C. Andrews, *supra* at 596 (the petition right "historically protected requests for some form of individual redress, even if by the legislature"). "[I]n England and in the colonies, there was no separation of powers as we conceive of that

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[3] While *McDonald* held that requests to executive officials were not absolutely privileged against actions for defamation, 472 U.S. at 486 (Brennan, J., concurring), it did nothing to disturb the settled understanding that the right to petition encompasses the invocation of adjudicatory processes or to approve retaliation against those who invoke them.

doctrine today." *Id.* For that reason, "petitions to the legislature were often judicial in nature," and the legislatures sometimes "performed judicial roles and resolved individual grievances that today would constitute civil actions." *Id.* In addition, "[w]hen early Parliaments received 'judicial' petitions, Parliament often referred petitions back to the common law courts," while also sending "some to the King's chancellor [the origin of the equity jurisdiction of the chancellor]" and acting upon some directly. *Id.* at 598.[4]

Properly understood, the origins and history of the right of petition support this Court's conclusion that it protects the individual's right of access to the government's adjudicatory processes for the resolution of private, individual disputes.

B. The Right of Access And The Free-Speech Right Address Distinct Constitutional Concerns.

Petitioners contend that *McDonald* v. *Smith*, 472 U.S. 479 (1985), stands for the proposition that the petition clause and the free-speech clause serve the

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[4] *See also* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 Hastings Const. L.Q. 15, 24 (1993) (petitions seeking individual relief based on private grievances were initially referred to special Parliamentary Committees for resolution through quasi-judicial hearings, and eventually went to the nascent court system); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 146 (1986) (in pre-revolutionary America, the petition right included individual complaints about mundane, private matters, often directed to the legislature); Katherine Shea, San Filippo v. Bongiovanni: *The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 Vand. L. Rev. 1697, 1701 (1995) (same).

same constitutional interests, and therefore that limits imposed on the exercise of free-speech rights must also be imposed on the petition right. In *McDonald*, this meant that the right to petition was subject to the state libel law's penalties for false and damaging statements, just as the free speech would have been. Here, petitioners say, this means that a public employee's petition is protected only if it addresses a matter of public concern, just as a public employee's speech would be. The analogy does not work.

As shown above, the right to invoke the state's formal adjudicatory mechanisms implicates constitutional concerns different from those addressed by the free-speech right. The law already recognizes the significance of these differences: Certain statements in court proceedings cannot form the basis of libel or defamation suits, even if those statements made out of court would be grounds for a tort, see *Imbler* v. *Pachtman*, 424 U.S. 409, 426 n.23 (1976); and baseless lawsuits may be punished, even if the same statements made elsewhere would be protected by the free-speech rights. See *Cal. Motor Transp. Co.*, 404 U.S. at 512; *Bill Johnson's Rests.*, 461 U.S. at 742-43 (access right protects only "well-founded" lawsuits that have a "reasonable basis" in fact or law). Of course, some limits on public employees' access to the courts are appropriate – but they are the constitutionally permissible limitations on litigation (*e.g.*, the absence of protection for frivolous litigation, see *Prof'l Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 65 (1993); Fed. R. Civ. P. 11), not the limits on free speech.

Put differently, the balance this Court struck in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964),

worked in *McDonald*. The government regulatory and policy interests supporting enforcement of defamation laws were the same in *New York Times* and *McDonald*: The state sought to provide remedies for those who suffered reputational harm and to prevent misinformation through tort liability. 472 U.S. at 484. The countervailing interests supporting free speech, too, were similar: The statements concerned a public figure and a matter of public importance. *Id.*

In contrast, at stake here are interests that do not directly correspond to those served by the free-speech right. Most notable is the state's ability to provide effective adjudicatory processes for the vindication of legal rights that are perceived as just and neutral – "the right conservative of all other rights [which] lies at the foundation of orderly government." *Chambers*, 207 U.S. at 148. And, these concerns – unlike the free-speech right in *Connick* – exist without regard to the content of the petition (the complaint or claim), making a content-based restriction such as *Connick*'s public-private distinction particularly inapt.[5]

This Court has held that the constitutional concerns implicated by the free-speech right are not undermined if public employee speech is protected

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[5] Indeed, the constitutional interests relevant to determining any limits on public employees' rights differ even within the same constitutional provision. Thus, public employees have the right to be free from class-based discrimination under the Equal Protection clause, but not from class-of-one discrimination. *See Engquist*, 553 U.S. at 604. Similarly, public employees have a First Amendment right to political autonomy that precludes state requirements that they pay certain union dues, *see Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007), but no right to speech unless it contributes to debate on matters of public concern. *See Connick*, 461 U.S. at 147.

only when it addresses matters of public concern. But, the interests protected by the component of the petition right that ensures access to the state's adjudicatory processes would be severely damaged by this limitation. It eviscerates the petition right – and the purposes it serves – if the state can retaliate against those who use its own adjudicatory systems. This Court has observed that "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548 (2001). The same vigilance is required when state and local governments retaliate against challenges brought by public employees.

II. THE GOVERNMENT'S INTERESTS ARE INSUFFICIENT TO JUSTIFY DEPRIVING PUBLIC EMPLOYEES OF THE RIGHT TO INVOKE THE STATE'S FORMAL ADJUDICATORY PROCESSES.

In part I, we showed that "the asserted employee right implicates the basic concerns of the relevant constitutional provision." *Engquist*, 553 U.S. at 600. Here, we show that "the realities of the employment context" do not justify depriving public employees of their constitutional right of access to the state's adjudicatory processes for complaints involving private matters, including employment-related claims. *Id.*

Like private employers, public employers have legitimate interests in managing employees and the workplace to effectively and efficiently accomplish the government's business. This Court has held that these interests justify certain limits on public employees' constitutional rights, some times requiring them to "give way to the requirements of the government as employer." *Id.* But, public

employers do not have a legitimate interest in retaliating against their employees who invoke the state's adjudicatory processes to address matters of private concern, including employment-related claims. Doing so is neither the general prerogative of private employers nor operationally necessary.

In virtually every federal and state law governing the employment relationship, one sees a reflection of the petition clause's prohibition of retaliation for the filing of complaints in courts or in administrative agencies. See, *e.g.*, *Gomez-Perez* v. *Potter*, 553 U.S. 474 (2008); *Jackson* v. *Birmingham Bd. Of Educ.*, 544 U.S. 167 (2005); *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442 (2008); *Robinson* v. *Shell Oil*, 519 U.S. 337 (1997); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969). The norm in both the public and private sector is that employers may not retaliate against employees who invoke the adjudicatory processes that the government establishes for the resolution of employment-related complaints. While private employers generally have the authority to discipline or discharge employees for disruptive or insubordinate speech (*Connick*, 461 U.S. at 147) or based on "subjective, individualized assessments" (*Engquist*, 553 U.S. at 603), they do not generally have the authority to discipline or discharge employees in retaliation for invoking the adjudicatory processes the state prescribes for the resolution of claims.

Contrary to petitioners (Br. 56), this virtual unanimity is no reason to limit the meaning of the petition clause. Instead, it demonstrates that public employers cannot reasonably claim that they will obtain any efficiency or effectiveness benefit if employees are denied the protection of the petition right here. Employers do not have a general right to

retaliate against employees who invoke the government's adjudicatory processes and public employers do not need this power to promote the public good. Indeed, the public good is undermined by such retaliatory conduct.

Second, a person's ability to invoke the state's judicial and administrative processes is essential to the effective enforcement of all other rights. Legal rights – including employment-related rights – cannot be enforced unless persons formally asserting their rights and seeking a remedy are protected from retaliation for doing so. See, *e.g.*, *Robinson*, 519 U.S. at 346 (fear of retaliation "deter[s] victims of discrimination from complaining"); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("effective enforcement could thus only be expected if employees felt free to approach officials with their grievances"). Allowing the state, including public employers, to retaliate against those who invoke the state's adjudicatory processes constructively denies access to those processes. Indeed, this Court implicitly recognized the importance of the procedural right of access to the state's adjudicatory processes in limiting the Constitution's substantive application to public employees in *Engquist*. See 553 U.S. at 609 ("[p]ublic employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains"). It is, accordingly, critically important to provide constitutional protection to public employees' right of access to these processes.

Third, the conduct at issue in cases involving the right to access is the pursuit of a judicial or administrative claim. That conduct does not occur at the work place itself; it is confined to a procedure that the government offers to resolve disputes. Its whole

point is to prevent unmanageable conflict and disruption of the work place, and to channel disputes into a state-prescribed forum.

Fourth, petitioners and their *amici* (Pet. Br. 36; US Br. 14) claim that allowing this petition clause claim will turn every personnel decision into a potential constitutional claim, trying to force this case into the *Connick* and *Engquist* model. In fact, enforcement of the access component of the petition right does not remotely "constitutionalize" every employee complaint about governmental personnel decisions. *Connick*, 461 U.S. at 154. It forbids only retaliation based on employees' invocation of state-prescribed forums (and even then it protects an employee's suit only if it is not baseless, see *Prof'l Real Estate Investors*, 508 U.S. at 56). It does not otherwise purport to regulate a public employer's ability to take any personnel action based on that employee's speech or conduct within or outside of the work place. It does not protect speech or expressive conduct on private matters; it does not forbid arbitrary, "incorrect or ill-advised personnel decisions." *Bishop v. Wood*, 426 U.S. 341, 350 (1976).[6]

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[6] Petitioners insinuate that allowing Guarnieri's claim would create a "new constitutional cause of action," Br. 57, akin to the constitutional claim against the United States that the Court declined to imply in *Bush v. Lucas*, 462 U.S. 367, 388 (1983). But respondent's claim is not implied, it arises under a federal statute, section 1983, that is hardly new. Petitioners mischaracterize the nature of Guarnieri's claim in an effort to persuade the Court that he is seeking something extraordinary. In fact, it is petitioners who must demonstrate that the government's needs as employer are sufficiently substantial to require that public employees be deprived of a fundamental constitutional right.

Petitioners and their *amici* say, however, that any employee complaint can be framed as a legal claim, and therefore that clever employees might file claims (instead of speaking out) to preempt punishment for their complaints. Pet. Br. 42; US Br. 20. But, most employee complaints *follow* personnel action which necessarily means that the personnel action complained of cannot be in retaliation for that employee complaint. Put differently, a public employee has no claim to file unless the public employer takes some *additional action* against him or her in response to a non-frivolous invocation of an adjudicatory process.[7]

Plainly, it is always true that disallowing constitutional claims against public employers will save those employers time and money, at least in the short run. But the savings petitioners seek here would result from conduct that is anathema to core concerns of the First Amendment's petition clause. That is not a permissible trade off.

Finally, petitioners and their *amici* assert that protecting employees from retaliation for invoking the state's adjudicatory processes would give public employees rights superior to those enjoyed by their

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[7] Petitioners make the related claim that allowing public employees protection from retaliation for invoking state-prescribed procedures to address matters of private interest will dramatically increase public employers' litigation costs, because fewer employee complaints involving First Amendment retaliation will be dismissed at the outset of litigation. But, as petitioners noted, Pennsylvania law provides that police officers in boroughs cannot be fired except for reasons enumerated by statute, *see* 53 Pa. Stat. Ann. §§ 812, 46190 (Pet. Br. 54-55); those reasons do not include the filing of a lawsuit, administrative claim, or grievance. If the Borough retaliates against a police offer for filing such a complaint, it will incur defensive litigation costs.

private sector counterparts. See, e.g., Pet. Br. 38-39; US Br. 20. This is also true for public employees in relation to free-speech rights: A public employee has a protected right to speak on matters of public concern while a private employee does not. The critical question is not whether public and private employees are identically situated; it is whether the government as employer has some substantial efficiency interest that justifies abridging the public employee's constitutional right. Here the employer cannot reasonably claim such an interest. As noted above, as a practical matter, federal and state law virtually always forbids private employers to retaliate against employees for invocation of adjudicatory processes.

Equally critical, this Court has already held in numerous circumstances that private employers and employees have a constitutional right to petition the government by invoking judicial and administrative processes to address private matters related to employer-employee relations. In doing so, this Court has rejected the affected government's arguments that substantial public interests and concerns require the employer's and employees' petition right to "give way." *Engquist*, 553 U.S. at 600. Thus, in *Bill Johnson's Restaurants*, this Court refused to allow the National Labor Relations Board to hold that an employer's lawsuit against its employees was an unfair labor practice, even when the employer's intent was to interfere with its employees' federally-protected rights. 461 U.S. at 741. And, in *United Mine Workers*, 389 U.S. at 222, and *Brotherhood of Railroad Trainmen*, 377 U.S. at 7, this Court held that although the state's interest in regulating the legal profession and limiting attorney solicitation was important, in certain circumstances it unconstitu-

tionally burdened private employees' rights of access to the courts.

Thus, the access component of the petition right of private employers and employees is of sufficient importance that it cannot be constrained or limited even to enforce federal and state laws regulating the work place. In light of this authority, petitioners' argument – that "the realities of the employment context" require limits on the access right – cannot be correct.[8]

In sum, the government's interests in retaliating against public employees who invoke the state's own adjudicatory processes to redress grievances are minimal at best and counterbalanced by the state's interest in the effectiveness of its processes and the public's perception of their integrity. The government's interests certainly do not outweigh the "basic concerns" of the petition right which are directly implicated by the issue presented.

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[8] Petitioners also argue that the Court should not treat components of the right to petition differently because distinctions between petitions that implicate that right of access to adjudicatory processes and those that do not are difficult and unworkable. Pet. Br. 29. This case involves only access to state-prescribed processes; that line is easy to draw. But, petitioners say, it is difficult to determine when a public employee has invoked the right to access; for example, is expressing an intent to file a complaint sufficient? In fact, courts routinely make such determinations in assessing petition-clause claims. *See, e.g., Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358 (5th Cir. 1983); *Glass Equip. Dev., Inc.* v. *Besten, Inc.*, 174 F.3d 1337, 1343-44 (Fed. Cir. 1999). The routine task of line-drawing provides no warrant for depriving public employees of their right to petition.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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No. 09-1476

IN THE

Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI, JR.,
Respondent

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.[1] This case concerns the extent to which the First Amendment right to petition the government for redress of grievances protects public employees from retaliation by their employers for litigating employment law claims through the proper legal procedures. Many of the employees represented by AFL-CIO affiliates are public employees. The AFL-CIO has, therefore, frequently filed *amicus curiae* briefs in cases concerning the constitutional rights of public employees. *See, e.g., City of Ontario v. Quon*, 130 S.Ct. 2619 (2010); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The AFL-CIO also has an interest in ensuring that employees are free to seek enforcement of employment laws without fear of employer retaliation and has filed *amicus* briefs in cases concerning the anti-retaliation provisions of various employment laws. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834.

STATEMENT

In February 2003, the Borough of Duryea, Pennsylvania discharged Charles Guarnieri from employment as

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[1] Counsel for the petitioners and counsel for the respondent have each filed a letter with the Court consenting to the filing of *amicus* briefs supporting either party. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Chief of Police. Pet. App. 4a. Guarnieri successfully arbitrated a claim that his discharge was not for "just cause" and was reinstated in January 2005 pursuant to the arbitration award. *Ibid.* Immediately upon Guarnieri's reinstatement, the Borough began taking a number of adverse employment actions against him. *Id.* at 4a-5a. Guarnieri challenged those adverse actions through a variety of channels, including the instant § 1983 lawsuit asserting that, by retaliating against him for arbitrating his wrongful discharge claim, the Borough abridged his First Amendment right to petition for redress of grievances. *Id.* at 5a. Ruling on Guarnieri's § 1983 claim, a jury found that the Borough had retaliated against Guarnieri for arbitrating his discharge claim. *Id.* at 5a-6a.

Guarnieri's legal challenge to his 2003 discharge implicated two statutes governing the employment of police and fire personnel by political subdivisions of Pennsylvania such as the Borough of Duryea: the Civil Service for Police and Firemen Act ("Police and Fire Civil Service Act"), 53 P.S. §§ 46171-46195, and the Policemen and Firemen Collective Bargaining Act ("Act 111"), 43 P.S. §§ 217.1-217.10. The Police and Fire Civil Service Act, derived from the Police Civil Service Act of 1941 and now codified as Article XI (j) of the Pennsylvania Borough Code, is a civil service law which sets forth the basic criteria and procedures by which borough police officers and fire fighters are to be hired, promoted, demoted, or discharged.[2] Act 111, enacted in 1968, authorizes collec-

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[2] The Police and Fire Civil Service Act applies only to those boroughs with a police force of three or more members. 53 P.S. § 46171. The Police Tenure Act applies to those boroughs with smaller police forces, as well as to certain townships, and provides largely similar protections to the Police and Fire Civil Service Act. *See* 53 P.S. §§ 811-816. Civil service laws specifically designed for police and/or fire fighters apply to other Pennsylvania political subdivisions as well.

tive bargaining and arbitration for police officer and fire fighters in Pennsylvania.[3]

Section 46190 of the Police and Fire Civil Service Act provides that "[n]o person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for [six specified] reasons." 53 P.S. § 46190. An employee who believes he has been suspended, removed, or reduced in rank in violation of the Act's provisions may challenge that violation before the borough's civil service commission. *See* 53 P.S. § 46191. The commission's decision may then be appealed to the

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note 2 cont.

See 16 P.S. §§ 4501-4525 (creating a civil service system for police and fire fighters in second class counties), 53 P.S. §§ 39861-39877 (creating a civil service system for fire fighters in cities of the Third Class), 53 P.S. §§ 58251-58277 (creating a civil service system for police in incorporated towns), 53 P.S. §§ 58301-58328 (creating a civil service system for fire fighters in incorporated towns). An assortment of other laws provide civil service protections to non-uniformed public employees employed by Pennsylvania and its political subdivisions. *See, e.g.*, Pennsylvania Civil Service Act, 71 P.S. §§ 741.1-741.1005 (creating a civil service system for non-uniformed state and some county employees).

[3] Act 111 provides collective bargaining rights to all "[p]olicemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth." 43 P.S. § 217.1. The Pennsylvania Labor Relations Act ("PLRA"), 43 P.S. §§ 211.1-211.13, extends collective bargaining rights to private employees not covered by the National Labor Relations Act. Act 111 has been read *in pari materia* with the PLRA, and many aspects of the PLRA's enforcement scheme are thus available to police and fire personnel and their employers covered by Act 111. *See, e.g., Borough of Nazareth v. Pennsylvania Labor Relations Board*, 534 Pa. 11, 626 A.2d 493 (1993); *Philadelphia Fire Officers Association v. Pennsylvania Labor Relations Board*, 470 Pa. 550, 369 A.2d 259 (1977). The Pennsylvania Public Employe Relations Act ("Act 195"), 43 P.S. §§ 1101.101-1101.2301, provides collective bargaining rights to non-uniformed public employees employed by the state or its subdivisions.

court of common pleas. *Ibid.* Judicial review of a municipal civil service commission's decision "is limited to determining whether constitutional rights have been violated, an error of law has been committed[,] or findings of fact necessary to support the adjudication are not supported by substantial evidence." *Day v. Civil Service Commission of the Borough of Carlisle*, 593 Pa. 448, 455, 931 A.2d 646, 650 (2007), quoting *Lewis v. Civil Service Commission of Philadelphia*, 518 Pa. 170, 542 A.2d 519, 522 (1988) (citing 2 Pa.C.S. § 754(b) and *Tegzes v. Township of Bristol*, 504 Pa. 304, 472 A.2d 1386 (1984)).

The collective bargaining agreement between the Borough of Duryea and the Duryea police incorporates Section 46190 of the Act by reference. *See* JA 57. Article 17 of the agreement provides:

> "No full time police officer covered by this agreement shall be discharged, suspended or demoted except for 'just cause' as defined in the civil service provisions of the Pennsylvania Borough Code, 53 P.S. Section 46190." *Ibid.*

Article 16 of the agreement provides for "final and binding arbitration" of "any dispute involving the interpretation and/or application of the terms of this Agreement, or any dispute involving the interpretation and/or application of the Borough's policies or procedures which affect the terms and conditions of employment, including matters of discipline." *Id.* at 56. By challenging his 2003 discharge through arbitration, Guarnieri waived resort to the civil service procedures. *See Township of Falls v. Whitney*, 730 A.2d 557, 561 (Pa. Commw. Ct. 1999).

The legal effect of the arbitration award reinstating Guarnieri was governed by Act 111, which sanctions the arbitration of disputes arising under a police or fire department collective bargaining agreement. *Pennsyl-*

vania State Police v. Pennsylvania State Troopers' Ass'n, 540 Pa. 66, 656 A.2d 83, 88 (1995). Act 111 provides that arbitration awards operate as a direct "mandate" to the public employer and thus are legally binding on the employer without the necessity of procuring a judicial order confirming the award. 43 P.S. § 217.7.[4] Failure to comply with an arbitration award constitutes an unfair labor practice subject to the remedial authority of the Pennsylvania Labor Relations Board. *See Smith v. Borough of Castle Shannon*, 163 Pa. Commw. Ct. 531, 641 A.2d 671, 673 (1994). A public employer that wishes to avoid the binding mandate of an arbitration award under Act 111 may petition to vacate the award, but "a court reviewing an Act 111 grievance arbitration award has an extremely limited scope of review." *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n*, 559 Pa. 586, 741 A.2d 1248, 1251 (1999). "[A] mere error of law would be insufficient to support a court's decision to reverse an Act 111 arbitrator's award." *Id.* at 1252.

The Borough did not petition to vacate the arbitration award finding that the Borough lacked just cause for discharging Guarnieri in February 2003. Thus, the award had the legal effect of a direct "mandate" to the Borough to remedy that legal wrong in the prescribed manner. 43 P.S. § 217.7(a). Failure of the Borough to implement the award would have violated Act 111 and the Pennsylvania Labor Relations Act. *See, e.g., City of Philadelphia*, 30 PPER 30204 (PLRB 1999).

In sum, Guarnieri invoked the legal procedures sanc-

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[4] A 1967 amendment to the Pennsylvania Constitution expressly authorized "the legislature to promulgate statutes which would provide for binding grievance and interest arbitration between police and fire personnel and their public employers." *Pennsylvania State Police*, 656 A.2d at 89 n. 14. *See* Pennsylvania Constitution Art. 3, Sec. 31.

tioned by Act 111 in arbitrating his claim that the Borough had violated the collective bargaining agreement and Section 46190 of the Police and Fire Civil Service Act incorporated in that agreement by discharging him in 2003. And, the adverse employment actions taken by the Borough against Guarnieri upon his reinstatement constituted retaliation for litigating his legal claim through the procedures provided by law.

SUMMARY OF ARGUMENT

The right to bring a legal claim to the forum provided by law implicates the basic concerns of the First Amendment's Petition Clause.

Employer retaliation against an employee who brings a legal claim to the proper forum for resolution is not a legitimate exercise of managerial discretion. The law uniformly forbids such employer action. Retaliation against an employee-litigant has nothing to do with the employer managing its own operations. Rather, such retaliation is an abuse of the employer's authority for the purpose of discouraging employees from bringing their legal claims against the employer to the proper forum. That being so, there is no reason that an employee-litigant's right to petition for redress of grievances should give way to an employer's interest in retaliating against the employee for so doing.

Public employees who suffer adverse employment action in retaliation for litigating claims against their public employers, therefore, have a cognizable claim under the Petition Clause of the First Amendment.

ARGUMENT

The question presented by this case is whether Charles Guarnieri has a Petition Clause claim against the Borough of Duryea for retaliating against him for litigating his

wrongful discharge claim. "[T]wo main principles" determine the extent to which a constitutional claim "is cognizable in the public employment context".

> "First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 600 (2008).

The right of public employees to petition for redress of legal claims through the litigation procedures provided by law *does* "implicate[] basic concerns" of the Petition Clause of the First Amendment. There is, moreover, *no* legitimate interest of the government as employer that would cause this right to "give way." Thus, a Petition Clause claim against the government for retaliating against one of its employees for seeking redress of a legal claim through the litigation procedures provided by law "is cognizable."

1 As a general matter, "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). "The right to litigate is an important one," *id.* at 744, that covers the full range of litigation, including "litigation . . . solely designed to compensate the victims of [personal wrongs]," *Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967). The right to litigate is not confined to judicial litigation but equally "governs the approach of citizens or groups of them to administrative agencies" and, indeed, "to all departments of the Government."

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). All that being so, litigation of a legal claim against the government through any of the "channels and procedures" provided by law – whether before a court, an administrative agency or a government-sanctioned arbitrator – implicates the basic concerns of the Petition Clause. *Id.* at 511.

Guarnieri's litigation of his wrongful discharge claim through the arbitration procedure provided by law was an exercise of the right to litigate protected by the Petition Clause. That claim sought redress of a violation of Section 46190 of the Police and Fire Civil Service Act, which was incorporated in the collective bargaining agreement covering Guarnieri's employment. *See* JA 57. Guarnieri chose to take his wrongful discharge claim to arbitration rather than to the Borough's police and firemen civil service commission. Under Act 111, the arbitration award in Guarnieri's favor had the force of law, and the Borough was constrained to obey the award.

The Borough does not contend that Guarnieri's litigation of his wrongful discharge claim is entitled to any less protection by virtue of his having litigated before an arbitrator rather than before the civil service commission. Both avenues are government-sanctioned procedures for adjudicating that statutory wrongful discharge claim. And both avenues provide for legally binding decisions. Thus, leaving aside that Guarnieri was a public employee, his litigation of the wrongful discharge claim through arbitration under Act 111 is well within the "important" "right to litigate" protected by the Petition Clause. *Bill Johnson's Restaurants*, 461 U.S. at 744.

2. Not only did Guarnieri's litigation of his wrongful discharge claim against the Borough "implicate[] the basic concerns of the [Petition Clause]," there is no sound reason that his right to bring that litigation should "give

way to the requirements of the government as employer." *Engquist*, 553 U.S. at 600.

With respect to a number of constitutional rights, this Court has "recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 553 U.S. at 599. "The extra power the government has in this area comes from the nature of the government's mission as employer," i.e., from the fact that "[g]overnment agencies are charged by law with doing particular tasks" and "hire employees to help do those tasks as effectively and efficiently as possible." *Id.* at 598 (brackets, quotation marks and citations omitted).

In particular, this Court "ha[s] refrained from intervening in government employer decisions that are based on speech that is of entirely private concern." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion). Thus, in *Connick v. Myers*, 461 U.S. 138 (1983), the Court held "that the First Amendment protects public-employee speech only when it falls within the core of First Amendment protection — speech on matters of public concern." *Engquist*, 553 U.S. at 600. The Borough would apply *Connick*'s holding outside the context of "government employer decisions that are based on speech," *Waters*, 511 U.S. at 674, to insulate government employer decisions to retaliate against an employee's "use [of] the channels and procedures" provided by law for adjudicating legal claims, *California Motor Transport*, 404 U.S. at 511. That suggested extension of *Connick* has no basis in the decision's holding or rationale.

Connick carved out an exception to the basic First Amendment principle that "the government . . . [can]not generally prohibit or punish . . . speech on the ground that it does not touch upon matters of public concern."

Engquist, 553 U.S. at 600. That exception withholds First Amendment protection from public employees for "expression [that] cannot be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. The basis for this exception is a very practical concern that "government officials should enjoy wide latitude in managing their offices," *ibid.*, comparable to that enjoyed by private employers. *See id.* at 147

Connick's exception to the First Amendment's general prohibition on government punishment of speech rests on the assessment that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Engquist*, 553 U.S. at 600 quoting *Connick*, 461 U.S. at 147. Evaluating "the wisdom of a personnel decision," *Connick*, 461 U.S. at 147, in reaction to employee speech can involve "a vast array of subjective, individualized assessments," *Engquist*, 553 U.S. at 603, such as whether the decisionmaker "reasonably believed [that an employee's speech] would disrupt the office, undermine his authority, [or] destroy close working relationships." *Connick*, 461 U.S. at 154. And, these determinations, in turn, require an evaluation of concrete circumstances, such as, "the manner, time, and place" of the speech. *Id.* at 152. Given the myriad considerations involved in making such a personnel decision, the Court "ha[s] refrained from intervening in government employer decisions that are based on speech that is of entirely private concern," even though "some such speech is sometimes nondisruptive" and "sometimes of value to the speakers and the listeners." *Waters*, 511 U.S. at 674.

The critical point for present purposes is that the holding in *Connick* is justified by a concern with "affording

government employers sufficient discretion to manage their operations" and particularly with avoiding "displacement of managerial discretion by judicial supervision." *Garcetti v. Ceballos*, 547 U.S. 410, 422-23 (2006). That concern does not, however, apply to "judicial oversight," *id.* at 423, of employer decisions to retaliate against employees for advancing legal claims through the proper "channels and procedures," *California Motor Transport*, 404 U.S. at 511. While the law generally recognizes that employers have a substantial legitimate interest in making "personnel decision[s] . . . in reaction to [an] employee's behavior," *Connick*, 461 U.S. at 147, the law does *not* treat personnel decisions taken in retaliation for litigation as a legitimate exercise of "managerial discretion," *Garcetti*, 547 U.S. at 423. To the contrary, the law treats the regulation of litigants as a matter peculiarly appropriate for "judicial supervision." *Ibid.* For precisely that reason, the law uniformly forbids employer retaliation against employee litigants.

To begin with, virtually every statute creating legal protections for employees contains an express prohibition on employer retaliation for resort to the statutory enforcement procedures. *See, e.g.*, 29 U.S.C. §158(a)(4) (National Labor Relations Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e-3(a) (Title VII of the Civil Rights Act). Pennsylvania law, moreover, makes it an unfair labor practice for public employers, such as the Borough, to retaliate against employees for bringing grievances to the arbitration mandated by the State's labor laws. *See Derry Borough*, 29 PPER ¶ 29237 (Final Order, 1998). In the absence of an express prohibition on retaliation, the substantive provisions of employment statutes will, if possible, be construed to extend protection against employer retaliation against employees who invoke the statutory rights. *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008) ("the ADEA fed-

eral-sector provision's prohibition of 'discrimination based on age' . . . likewise proscrib[es] retaliation"); *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 174 (2004) ("retaliation is discrimination 'on the basis of sex'" in violation of Title IX).

Where there is no statutory retaliation prohibition, the common law provides a tort remedy against employers – both private and public – for taking adverse employment action against an employee for litigating an employment law claim. Thus, the Restatement (Third) of Employment Law states as a black letter rule that "[a]n employer that discharges or takes other material adverse action against an employee because the employee has or will engage in protected activity [as defined] is subject to liability in tort for wrongful discipline in violation of public policy" and includes among the defined protected activities "fil[ing] a charge or claim[ing] a benefit under the procedures of an employment statute or law (irrespective of whether the charge or claim is found meritorious)." Restatement (Third) of Employment Law §§ 4.01 & 4.02(c) (Tentative Draft No. 2, 2009).[5] "[T]he rationale behind this rule," the Restatement explains, "is to protect the public interest embodied in the employment laws by blunting the ability of employers to use economic pressure to undermine the willingness of employees to claim employment benefits or rights to which they are entitled." *Id.* § 4.02, comment d. "Public policy favors the filing of charges, claiming of benefits, or other participation in the formal administra-

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[5] The cited version of the Restatement Third of Employment Law was approved by the membership of the American Law Institute at its 2009 Annual Meeting "subject to the discussion at the meeting and to editorial prerogative." *See* www.ali.org/index.cfm?fuseaction= publications.ppage&node_id=31 (last checked Dec. 17, 2010). Once approved, "Tentative Drafts may be cited as representing the most current iteration of the [American Law] Institute's position until the official text is published." *Ibid.*

tive and judicial processes of the employment laws." *Ibid.*

In sum, "the requirements of the government as employer," *Engquist*, 553 U.S. at 600, do not extend to taking adverse employment action against employees for bringing legal claims through the proper "channels and procedures," *California Motor Transport*, 404 U.S. at 511. Thus, there is no reason that the "important" "right to litigate" protected by the Petition Clause. *Bill Johnson's Restaurants*, 461 U.S. at 744, should "give way," *Engquist*, 553 U.S. at 600, to make room for that retaliatory employer conduct.

3. The Borough's brief to this Court tacitly admits that its interest in being free to retaliate against employees who litigate legal claims of the sort brought by Guarnieri has nothing to do with "manag[ing] [its] operations," *Garcetti*, 547 U.S. at 422, and everything to do with preventing its employees from bringing legal claims to the proper forums.

The Borough argues, in this regard, that "the practical challenges of the government's role as employer are at least as substantial when an employee files a formal grievance or lawsuit as when that employee lodges an informal complaint or simply engages in speech." Pet. Br. 40-41. However, the only support the Borough can muster for its assertion that formal "[g]rievances and lawsuits are likely to be even more disruptive and polarizing than less formal communications," *id.* at 41, is the observation that "less formal communications" are more amenable to "voluntary compromise," *ibid.*, and are not a drain on the employer's "litigation budget," *id.* at 43. Those objections, however, apply to any litigation brought against the government and have nothing to do with "managing the[] office[]." *Connick*, 461 U.S. at 146.

The Borough also argues that protecting employees against retaliation for "invok[ing] the procedures of the law," Restatement, comment d, would allow "an end-run around *Connick*'s public concern requirements" by granting protection to employees who "recast informal complaints as official grievances or lawsuits," Pet. Br. 36. But protecting employees who bring "official grievances or lawsuits," *instead* of making informal complaints, is *not* an evasion of *Connick* at all. And, the public employer's discretion to discipline an employee for making disruptive informal complaints would not be limited by the employee also filing a formal complaint, for it would be a complete defense to any petition clause claim brought by the employee that the discipline was imposed because of the employee's unprotected speech.

In the end, the Borough's argument that public employers should have leeway in disciplining public employees who bring legal claims against them boils down to nothing more than a plea to allow "a public employer to leverage the employment relationship," *Garcetti*, 547 U.S. at 419, in order "to use economic pressure to undermine the willingness of employees to claim employment benefits or rights to which they are entitled," Restatement § 402, comment d. Subjecting this sort of public employer conduct to "judicial supervision" presents no risk to any legitimate exercise of "managerial discretion." *Garcetti*, 547 U.S. at 423

4. As an afterthought, the Borough attempts to turn the uniform legal condemnation of employer retaliation against employee-litigants to its advantage by pointing out that public employees frequently have statutory and contractual remedies for that wrong. Pet. Br. 52-58. As grounds for denying public employees First Amendment protection against such retaliation, the Borough notes that many of these remedies may be better suited to

redressing retaliatory disciplinary actions than what the Borough describes as "a one-size-fits-all cause of action under the Petition Clause." Pet. Br. 53.

Be that as it may, whether public employees have a cause of action under the Petition Clause is *not* a matter of "the creation of a new judicial remedy." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). Congress created a remedy by enacting § 1983, which provides a cause of action against anyone who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. And, as a general matter, litigants are not required to exhaust available administrative or other remedies before bringing a claim under § 1983. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

Of course, "litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective." *Patsy*, 457 U.S. at 513 n. 15. And, we expect that most public employees would first seek to redress retaliation claims through any available statutory and contractual remedies before going to the expense of bringing a § 1983 lawsuit. But the choice of forum is for the plaintiff-employee and not for the defendant-employer.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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BOROUGH OF DURYEA, PENNSYLVANIA, et al.,
Petitioners,

v.

CHARLES J. GUARNIERI, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Brief of Florida, Alabama, Colorado, Delaware, Hawaii, Illinois, Indiana, Louisiana, Maine, Michigan, Mississippi, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming In Support of Petitioners

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QUESTION PRESENTED

Can public employees sue their employers under the Petition Clause for adverse employment actions allegedly resulting from the employees' petitioning on matters of purely private concern?

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STATEMENT OF AMICI INTEREST

The Amici States have an interest in this case due to its potential to define the boundaries of the First Amendment rights of their employees and because of its ability to impact employers' capacity to efficiently manage their workplaces.[1] States as public employers make a litany of personnel decisions every day, many involving private grievances of their employees. The Third Circuit's holding, that a public employee can bring a Petition Clause challenge on a matter that amounts to a private grievance, creates the potential for transforming relatively minor employment disputes into constitutional litigation in federal courts that will impede the ability of the States to efficiently administer their workplaces to better serve their citizens.

The Third Circuit's view of the scope of the Petition Clause is contrary to every court that has considered the issue. The interest of the Amici States is to ensure that the Petition Clause is read no more broadly than its neighbor, the Free Speech Clause, so that public sector employers can manage their offices without the fear that routine managerial decisions involving private grievances will result in federal constitutional claims.

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[1] State and local governments are often the largest employers in their jurisdictions. *See* Bureau of Labor Statistics, United States Dep't of Labor, *Career Guide to Industries, 2010-11 Edition, State & Local Gov't, Except Educ. & Health*, *available at* http://www.bls.gov/oco/cg/cgs042.htm ("Excluding education and hospitals, State and local governments employ 8.3 million workers, placing them amongst the largest employers in the economy.") (last visited Dec. 13, 2010).

SUMMARY OF ARGUMENT

The Third Circuit's holding that a public employee has a cognizable Petition Clause claim even where the underlying grievance does not involve an issue of public concern is faulty for several reasons.

First, the threshold inquiry as to whether a challenged restraint violates a public employee's First Amendment rights is whether the speech involves a matter of public concern. This Court's precedents have held that run-of-the-mill intra-office disputes have no First Amendment protections where no issues of public concern are implicated. *Connick v. Myers*, 461 U.S. 138, 143-48 (1983). Here, the underlying issue is an allegation that a public employer retaliated against an employee for filing a grievance about a wholly personal workplace matter. Ordinarily, this type of grievance — involving no issue of public concern — would not support a First Amendment claim of any kind by the employee. For the same reasons that free speech rights are not implicated when matters of private concern underlie grievances, Petition Clause rights are not implicated under similar circumstances.

Second, the Third Circuit erred in reasoning that the Petition Clause has broader application than other First Amendment rights in the employment context. This distinction has no textual basis in the constitution; it also goes against the principle that courts should not transform minor employment matters into constitutional disputes absent the presence of issues of public concern for which core First Amendment protections are intended.

Finally, as a practical matter, public employees have recourse under state and local laws to challenge workplace improprieties that fall short of matters of public concern. For instance, a litany of public sector whistleblower laws allow employees the opportunity to raise workplace concerns. These statutes generally do not require that the speech at issue involve a matter of public concern. In addition, many States and local governments have collective bargaining agreements that permit public sector employees to raise claims alleging they have suffered adverse personnel decisions because they filed grievances. Given the protections afforded, both by these laws and the First Amendment generally for matters of public concern, the expansion of the Petition Clause to create a new type of constitutional claim is misguided. The Third Circuit's decision should be reversed.

ARGUMENT

I. Retaliation Claims Under the Petition Clause on Matters that Amount to Personal Grievances Contravene this Court's Precedents and Undermine State and Local Laws Addressing These Common Workplace Disputes.

The Third Circuit's precedents,[2] which hold that a public employee may bring a retaliation claim under the Petition Clause when the allegedly protected speech involves a private workplace dispute, are outliers: ten other circuit courts have considered this issue and reached results contrary to the Third Circuit.[3] These decisions demonstrate that the Third Circuit's reasoning is inconsistent with this Court's Free Speech Clause jurisprudence, which holds that the threshold inquiry to determine whether a public employee's speech is insulated from employer

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[2] *See Brennan v. Norton*, 350 F.3d 399, 417 (3d Cir. 2003); *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994); *see also Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007).

[3] The ten other circuit courts that have considered this question have held that a public employee's claim under the Petition Clause must involve a matter of public concern. *See Adair v. Charter Cnty. of Wayne*, 452 F.3d 482, 492 (6th Cir. 2006); *Kirby v. Elizabeth City, N.C.*, 388 F.3d 440, 446 (4th Cir. 2004); *Martin v. Del. Cnty.*, 179 F.3d 882, 887-89 (10th Cir. 1999); *Tang v. R.I., Dep't of Elderly Affairs*, 163 F.3d 7, 11-12 (1st Cir. 1998); *Grigley v. Atlanta*, 136 F.3d 752, 756 (11th Cir. 1998); *Kendish v. Tacoma*, 123 F.3d 1216, 1220 (9th Cir. 1997); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Hoffmann v. Mayor, Council, & Citizens of Liberty*, 905 F.2d 229, 234 (8th Cir. 1990); *Rathjen v. Litchfield*, 878 F.2d 836, 841 (5th Cir. 1989); *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412 (7th Cir. 1988).

discipline involves determining whether the employee was speaking as a "citizen" about a matter of "public concern." *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The First Amendment does not insulate employee speech from disciplinary sanctions when speaking on subjects that relate exclusively to official job responsibilities. *See id.* at 424.

The Third Circuit distinguishes the Petition Clause from the Free Speech Clause on the grounds that the former has, historically, been understood to afford broader protections. *See San Filippo*, 30 F.3d at 442-443 (describing the common law origins of the Petition Clause and observing that it was more expansive in application and protections than the Free Speech Clause). The Third Circuit's approach, however, is flawed for two reasons: (1) this Court's First Amendment precedents do not recognize a broader scope of protection under the Petition Clause where the balance of employer-employee rights is at stake and private disputes are at issue; and (2) it disregards the wide swath of existing state and local protections for employees such as whistleblower statutes and collective bargaining agreements, which protect public sector employees from unjust discrimination based on the filing of private grievances. Given these flaws, no reason exists to uphold the addition of another layer of protection for private disputes under the Petition Clause.

A. Restraints on or discipline for public employees' workplace speech or petitioning are permissible where employees do not speak or petition as a "citizen" and their speech or petitioning implicates no matters of "public concern."

Public employees do not relinquish their First Amendment rights by accepting an offer to work in the public sector. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995). Nor are such rights unfettered. Rather, the limiting principle on the exercise of First Amendment rights is that public employees are not entitled to protections when the exercise of their rights involves a minor personal grievance between employer and employee. The threshold inquiry regarding whether a public employee's speech is insulated from discipline involves determining whether the speech at issue implicates a matter of "public concern." *See, e.g., San Diego v. Roe*, 543 U.S. 77, 82-83 (2004) (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)). As this Court has recognized, competing principles come into play when public employee's speech is balanced against the important interests of the government as an employer. This Court has sought to bridge these principles in a series of cases addressing the scope of First Amendment rights of public employees. These cases do not provide any principled basis to jettison the limiting principle that in determining the First Amendment rights of public employees, courts must scrutinize whether a matter of public concern was involved. The degree of protection afforded by the First Amendment should not turn on the manner in which the speech is denominated; petitioning activities should not be entitled to greater

constitutional protections than speech activities.

In *Connick v. Myers*, a public employee (Myers) opposed being transferred to a different division by her supervisor. 461 U.S. at 140. In response, Myers circulated a questionnaire in her office, asking fellow employees, among other things, how they would characterize office morale and whether the employees had any confidence in their supervisors. Myers was subsequently terminated, ostensibly because she had refused to accept her transfer. In analyzing Myers' First Amendment claim, this Court invoked the balancing test applied in *Pickering v. Board of Education*[4] to determine whether Myers' speech was protected from discipline. This Court noted that Myers' dispute with her employer did not implicate a matter of public concern simply because the

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[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968), involved a school teacher (Pickering) who sent a letter to the local newspaper challenging expenditures made by the local Board of Education. Pickering was critical of measures that had been enacted to increase revenue for the school district. These criticisms, as it turned out, were erroneous. He was dismissed from his teaching position on the basis that his letter threatened the effective functioning of the Board's administration of its schools. *Id.* at 564-66. Recognizing the competing interests of the Board, which was required to effectively manage its schools, and Pickering's right to speak out as a citizen on matters of public importance, this Court observed that a balance needed to be struck "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The court held, absent a showing that Pickering's false statements were "knowingly and recklessly made by him, . . . his right to speak to issues of public importance [could] not furnish the basis for his dismissal from public employment." *Id.* at 574.

questionnaire related to the internal dynamics of the District Attorney's Office. *Id.* at 143.

The Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147. The determination whether a matter was one of "public concern" is gauged from the "content, form, and context of a given statement, as revealed by the whole record." *Id.* The Court found that the questionnaire at issue related to a matter of personal concern: Myers' unwillingness to accept a transfer. The questionnaire was not of public concern because the questions did not imply that the District Attorney's Office had engaged in malfeasance. *Id.* at 148. In ruling against Myers, the Court noted that it must ensure "that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Id.* at 147.

Two limiting principles from *Connick* apply here as well. First, it can equally be said that when a public employee administratively files a grievance "not as a citizen upon a matter of public concern, but instead as an employee upon matters only of personal interest" the federal courts are not available "to review the wisdom of the personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147. Second, while this Court

must ensure that Petition Clause rights are not lost simply because an employee works for the government, no "grant of immunity for employee grievances" becomes available under the First Amendment simply because the employee works for the government. *Id.*

These principles were further discussed in *Garcetti v. Cebellos*, a case exploring the contours of a public employee's right to speak out against alleged improprieties by a public employer. 547 U.S. 410 (2006). Ceballos, who was employed with the Los Angeles District Attorney's Office, received information about a pending criminal case suggesting that information underlying an affidavit used to secure a search warrant was inaccurate. *Id.* at 413-14. Ceballos investigated the matter for himself and agreed that some of the information it contained was unreliable and relayed his concerns to his superiors. *Id.* at 414. He also drafted two separate memos for the benefit of his employer. The first described the flawed contents of the affidavit; the second described the conversation Ceballos had with the warrant affiant. *Id.* The office nevertheless proceeded with the case, and Ceballos was called by the defense to testify about his concerns with the affidavit's factual veracity. *Id.* at 414-15. Ceballos alleged that as a result he was subjected to a series of retaliatory measures by his employer. *Id.* at 415. He ultimately sued in federal court alleging that, among other claims, his First Amendment rights had been violated.

In finding no violation, this Court noted that Ceballos was simply speaking out about matters that related to his official job responsibilities, i.e., the proper disposition of a case. The Court observed that "[r]estricting speech that owes its existence to a public

employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 at 421-22. As such Ceballos' employers could permissibly discipline him if they believed his memo was needlessly inflammatory. *Id.* at 423. He was not speaking as a citizen on an issue of public concern; instead, he was simply speaking out about an issue that arose in the course of doing his job. Consequently, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424.

The Third Circuit's approach gives insufficient weight to the competing interests of public employers and employees by permitting an employee to bring a First Amendment retaliation claim even though the speech does not involve issues of public concern. Its interpretation turns on a perceived distinction between the First Amendment's Free Speech and Petition Clauses. *San Filippo*, 30 F.3d at 441-442. The Petition Clause, it is argued, provides broader First Amendment protections than the Free Speech Clause because the Petition Clause embraces claims that do not require that a matter of public concern be implicated. *Id.* at 442. So long as the public employee has availed him or herself of a formal grievance mechanism, that employee is insulated from employer retaliation and may bring a claim under the Petition Clause despite the grievance involving no matter of public concern. *Id.* This result is ill-considered and invites a host of problems.

From a public employer's perspective, the Third Circuit's view of the breadth of the Petition Clause raises serious management concerns. A real and

substantial risk exists that public employees will simply use formal grievance mechanisms as a pretext for a First Amendment claim against employers. Consider a simple, yet common, situation that occurs in the context of public employment. A public employee is aware that his employer is seeking to reduce staff for the upcoming fiscal year due to budget cuts. The employer has concomitantly announced plans to institute a comprehensive review and the review process will dictate staff reductions. Cognizant of his tenuous employment status, the employee preemptively files a non-frivolous (yet trivial) complaint to his superiors about an entirely personal matter of relevance only to the employee. Under *San Filippo* and its progeny, the employee has likely inoculated himself from any type of discipline, even when desperately necessitated, simply by making prospective use of internal grievance procedures. 30 F.3d at 441-42 ("[I]t would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious 'petition' . . . may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur."). Moreover, if the public employee suffered any adverse consequences subsequent to the review process, under the Third Circuit's reasoning the employee would have a cognizable retaliation claim under the Petition Clause. *Id.* (observing that a "non-sham" grievance or lawsuit was entitled to constitutional protection irrespective of the fact that the underlying matter did not involve an issue implicating public concern).

The Third Circuit's approach would lead to unacceptable results under a wide range of applications, including those underlying *Garcetti v.*

Ceballos. This Court held that because Ceballos' memorandum was drafted in the course of his job duties, he did not have a cognizable claim under the Free Speech clause for any discipline that occurred as a consequence of drafting it. However, under the Third Circuit's view, a different outcome could result if Ceballos had filed a claim under the Petition Clause. If Ceballos drafted the identical memorandum in the form of an internal or administrative grievance, and later suffered discipline as a result, he would have a cognizable constitutional claim. A similar claim brought under the Free Speech clause would result in a dissimilar outcome.

Indeed, the Third Circuit's approach, if applied to the fact patterns of the cases considered by the circuit courts who have ruled differently, would open a Pandora's Box of litigation over commonplace workplace grievances that have no place in federal court. *See, e.g., Tang v. R.I., Dep't of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998) (observing that Petition Clause claims simply involved "individual personal complaints about working conditions"); *Grigley v. Atlanta*, 136 F.3d 752, 755 (11th Cir. 1998) (rejecting public employee's claim that his testimony constituted protected speech under the Petition Clause, given the testimony concerned a private domestic altercation the employee had with a co-worker at his home); *Hoffmann v. Mayor, Councilmen, & Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990) (recognizing that employee's claim was "wholly personal" because it involved "a grievance complaint pursuant to the City's personnel rules complaining of his dismissal"); *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 419 (7th Cir. 1988) (public employee's lawsuit specifically related to the denial of a job promotion — the lawsuit was not attempting to vindicate greater rights).

The Third Circuit's approach elevates the form of the employee's grievance over the substance of whether it involves a matter of public concern. It creates simply too fine a line in distinguishing between the scope of the Petition Clause versus the Free Speech Clause in the employment context. The "public concern" test, albeit not perfect in its administration, provides a clearer line for both public employers and public employees. Public employers should be afforded the necessary leeway to make managerial decisions (and in necessary cases impose discipline) without fear of becoming embroiled in a federal constitutional dispute.

The Third Circuit's reasoning is problematic because it does not fully weigh the interests of public employers, who are distinct from private sector employers. This Court has been willing to allow speech restrictions instituted by public employers in the name of institutional efficiency. *See Garcetti*, 547 U.S. at 422 ("Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations."). Requiring that public employees' First Amendment claims be based on matters of public concern is a reasonable limiting principle on these types of legal claims.

From a public employer's perspective, the Third Circuit's approach creates the potential for routine managerial decisions having no public import to assume constitutional status. *Cf. id.* at 420 ("Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'") (quoting

Connick, 461 U.S. at 154). The Third Circuit's approach places federal courts in the position of weighing the propriety of managerial decisions whenever an employment grievance arises and a claim is filed.

The simple act of filing a lawsuit or grievance should not, in itself, confer a greater quantum of constitutional protection than other forms of speech. No reasoned basis exists to suggest that the Petition Clause was intended to assume a superior status vis-à-vis the Free Speech Clause in the employment context. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression."). Why should public employees who file an administrative "grievance" not have to establish — like others who exercise First Amendment rights — that their grievances satisfy the test for "matters of public concern"? Under the Third Circuit's approach, a court will not inquire into the context of the grievance, such as whether it involves an allegation of corruption, bribery, wide-spread racial discrimination, personal improprieties, biased hiring practices, fiscal mismanagement, or malfeasance. Instead, as long as the dispute is denominated as a "grievance" or the like, no inquiries need be made about the content or context of the dispute.

This reasoning is peculiar because it seems incongruous to hold that the manner in which the speech was styled predominates over the analysis of its substance. Consider that under the Third Circuit's paradigm, Ceballos' "memorandum" involving the proper disposition of a case and Myers'

"questionnaire" about office morale would be entitled to lesser constitutional protection than Mr. Guarnieri's "grievance" challenging a series of new job directives — without, it seems, any actual inquiry as to the substance of the underlying claims.

* * *

In summary, the Third Circuit's view contravenes this Court's prior precedents which have held that a matter of public concern must be at issue. *See Nat'l Treasury Emps. Union*, 513 U.S. at 466 (observing that a public employee was entitled to First Amendment protections "only when the employee spoke 'as a *citizen* upon matters of public concern rather than *as an employee* upon matters only of personal interest.'") (quoting *Connick*, 461 U.S. at 147). The Petition Clause should provide qualitatively no broader constitutional protection for public employees compared with other First Amendment protections. The First Amendment's Petition Clause should not serve as a vehicle to challenge all measures of employer-employee interactions. Said differently, every private workplace dispute that ultimately works to the disadvantage of the government employee does not constitute an impingement on the employee's First Amendment rights.

B. The Third Circuit's approach ignores the important protections of state and local "whistleblower" laws and collective bargaining agreements.

The Third Circuit's approach raises the concern that constitutionalizing Petition Clause claims for workplace grievances not involving matters of public

concern will thwart or marginalize (a) laws enacted by state and local governments that address public employees' private workplace grievances as well as (b) collective bargaining agreements that create and protect employees' rights. As this Court has noted, a "powerful network of legislative enactments — such as whistle-blower protection laws and labor codes — [are] available to those who seek to expose wrongdoing." *Garcetti*, 547 U.S. at 425. The Third Circuit's view, that employers will have the ability to suppress the petitioning activities of employees absent broader First Amendment protections, is unpersuasive in light of these laws. Moreover, the recognition of a federal Petition Clause claim creates an incentive to bypass these state and local protections in favor of a federal lawsuit.

1. The efficacy of state whistleblower laws and anti-retaliation provisions may be undermined by Petition Clause retaliation claims related to personal matters.

Every State affords its workers, whether in the private or public sector, some form of protection from retaliation for exposing employer misconduct.[5] Characterized as "whistleblower laws," these statutes vary in their breadth and applicability.[6]

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[5] *See* Elletta Sangrey Callahan & Terry Morehead, *The State of State Whistleblower Protection*, 38 Am. Bus. L.J. 99, 100 (2000) ("Whistleblower protection statutes have been enacted in each of the fifty states.")

[6] Callahan & Morehead, *supra* note 5, at 132-175, Appx. A (identifying the wide variety of whistleblower protections available throughout the United States).

An example is the Florida Public Sector Whistleblower Act ("Florida Whistleblower Act"),[7] whose legislative intent "is to prevent retaliatory action against employees who disclose misconduct on the part of public officials." *Fla. Dep't of Transp. v. Fla. Comm'n on Human Relations*, 842 So. 2d 253, 256 (Fla. Dist. Ct. App. 2003).[8] The Act is remedial in nature and "construed liberally in favor of granting access to the remedy." *Martin Cnty. v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992). It applies to "any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university." Fla. Stat. § 112.3187(3)(a).

The Florida Whistleblower Act states that "[a]n agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section." Fla. Stat. § 112.3187(4)(a).[9] It protects disclosures of

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[7] Florida has a Private Sector Whistleblower Act, which is similar to the Florida Public Sector Whistleblower Act in many respects. *See* Fla. Stat. §§ 448.101-448.105.

[8] The Florida Public Sector Whistleblower Act prohibits retaliation against any individual "who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee." Fla. Stat. § 112.3187(2).

[9] Under section 112.3187(3)(c) an "adverse personnel action" is characterized as: "[T]he discharge, suspension, transfer, or (Continued ...)

information including: "Any violation or suspected violation of federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety or welfare" as well as "[a]ny act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor." *Id.* §§ 112.3187(5)(a)-(b).

In many respects the Florida Whistleblower Act, and analogous state whistleblower laws, provide broader protections to public employees than are available under the First Amendment. *See Stone v. Everglades City, Fla.*, 2007 WL 1247979, at *3 (M.D. Fla. April 30, 2007) ("Florida's Whistle-blower's Act is thus not limited to speech protected by the First Amendment."). The Florida Whistleblower Act, for example, does not mandate that the public employee's grievance involve a matter of public concern. *See Rosa v. Dep't of Children & Families*, 915 So. 2d 210, 212 (Fla. Dist. Ct. App. 2005) (conceding that employee's allegations could reasonably be considered a personal "rant" against an employer or allegation of misfeasance, but that this issue was for a jury to decide).

To have a colorable cause of action under the Florida Whistleblower Act, no requirement exists that

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demotion of any employee or the withholding of bonuses, the reduction in salary or benefits, or any other adverse action taken against an employee within the terms and conditions of employment by an agency or independent contractor."

the public employee speak as a "citizen" on a newsworthy matter. *See, e.g., Walker v. Dep't of Veterans Affairs*, 925 So. 2d 1149 (Fla. Dist Ct. App. 2006) (employee alleged that he was retaliated against for raising concerns about the safety of a van he was driving). Instead, a state employee has sixty days within which to file a formal complaint alleging that he was discharged, disciplined or suffered an adverse personnel decision as a consequence of engaging in conduct protected under the statute. *See* Fla. Stat. § 112.31895(1)(a). The statute requires that to have a colorable claim, the complainant must satisfy the following criteria: "'(1) prior to [the adverse personnel decision] the employee made a disclosure protected by the statute; 2) the employee was [subjected to an adverse personnel decision]; and 3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee.'" *Walker*, 925 So. 2d at 1150 (quoting *Fla. Dep't of Transp.*, 842 So. 2d at 255). Following receipt of the complaint, the Florida Commission on Human Relations bears the responsibility for investigating the allegation of reprisal. Fla. Stat. § 112.31895(2)(a).

The Florida Whistleblower Act typifies efforts by other state legislatures in the last several decades to protect public employees from retaliatory consequences for disclosures of governmental wrongdoing, waste, or abuse.[10] These States allow

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[10] *See, e.g.*, Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees who Disclose the Wrongdoing of Employers?*, 38 S.D. L. Rev. 316, 319-327 (1993) (discussing the evolution of state and federal whistleblower protection laws since the 1960s). *See also* Callahan & Morehead, *supra* note 5, at 132-

(Continued ...)

employees to give voice to concerns about matters that may impact the proper functioning of the workplace, thereby improving governmental operations. States have different degrees of protection for their public sector employees. For example, some provide protections for all public sector employees.[11] Others provide protections for both private and public employees and/or employers.[12] State whistleblower laws have their own administrative requirements regarding the exhaustion of remedies. For example, an employee in Connecticut is required to initially file a whistleblower complaint with the Auditor of Public Accounts whereas an employee in New Jersey is first required to provide notice of wrongdoing to the appropriate supervisor to address the underlying matter in an expeditious manner. *Compare* Conn. Gen. Stat § 4-61dd (discussing Connecticut's administrative requirements), *with* N.J. Stat. Ann.

75, Appx. A (enumerating state whistleblower laws), Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 Admin. L. Rev. 581, 582 n.3 (1999) (listing hundreds of state statutes protecting whistleblowers).

[11] *See Garcetti*, 547 U.S. at 440 n.8 (Souter, J., dissenting) (citing Del. Code Ann. tit. 29, § 5115 (2003); Fla. Stat. § 112.3187 (2003); Haw. Rev. Stat. § 378-61 (1993); Ky. Rev. Stat. Ann. § 61.101 (West 2005); Mass. Gen. Laws ch. 149, § 185 (West 2004); Nev. Rev. Stat. § 281.611 (2003); N.H. Rev. Stat. Ann. § 275-E:1 (Supp. 2005); Ohio Rev. Code Ann. § 4113.51 (Lexis 2001); Tenn. Code Ann. § 50-1-304 (2005)).

[12] *See, e.g.*, Conn. Gen. Stat. §§ 31-51m, 4-61dd; Fla. Stat. §§ 112.3187, 448.102; Haw. Rev. Stat. § 378-61; Me. Rev. Stat. tit. 5, § 4572-A; Minn. Stat. § 181.931; Neb. Rev. Stat. §§ 48-1102, 48-1114; N.H. Rev. Stat. Ann. § 275-E:2; N.J. Stat. Ann. § 34:19-3; N.D. Cent. Code § 34-01-20; Ohio Rev. Code Ann. §§ 4113.52(A)(1), 124.341; Or. Rev. Stat. § 659A.200; R.I. Gen. Laws § 28-50-4; Tenn. Code Ann. § 50-1-304.

§ 34:19-1 (outlining New Jersey's administrative requirements before a complaint can be filed with a public body).

The Third Circuit's approach has the potential to undermine these public sector whistleblower laws, which strike a workable balance between rights of public employees to expose workplace misconduct and rights of public sector employers to administer services efficiently. Consequently, federal courts should not be needlessly forced, under an overly broad view of the scope of the Petition Clause, into resolving intra-office disputes that amount to private grievances.

By allowing public employees to raise First Amendment claims under the Petition Clause without regard to the content of the speech, the Third Circuit undermines the incentive for individuals to first use applicable state whistleblower statutes. The Third Circuit holds that as long as a public employee has filed a non-frivolous grievance or complaint, that employee may have a cognizable retaliation claim under the Petition Clause. This belief seems predicated on the concern that, without broad protections, public employees will not have the ability to challenge employer misconduct. This approach, however, has unintended consequences. For example, any time a public employee files an administrative grievance should an employer assume that an entirely unrelated adverse administrative or disciplinary action is never permissible? If an employee believes he will automatically have a federal forum to raise concerns about alleged workplace improprieties, why bother to pursue relief under whistleblower statutes? And, if the Petition Clause provides duplicative

protections with state whistleblower laws, what need exists for the latter?

Public sector whistleblower laws exist, in many respects, to provide public employees with a mechanism to expose misconduct — whether a public concern or not — without the fear of incurring an adverse personnel decision. By eliminating the requirement that a public employee's grievance must involve a matter of public concern, the Third Circuit's approach undermines state whistleblower laws and potentially makes federal courts the first avenue for relief, versus the last, for matters that do not involve public concerns.

2. The efficacy of collective bargaining agreements, labor laws, and related common law doctrines may be undermined by Petition Clause retaliation claims related to personal matters.

Public employees, particularly those who work in state government, have a raft of contractual protections that safeguard them from retaliation for engaging in protected activity. A non-exhaustive listing of state statutes evidences that a majority of States permit public employees to engage in collective bargaining with their employers regarding matters including filing formal grievances or complaints without fear of discharge or discrimination from the employer.[13]

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[13] *See, e.g.*, Alaska Stat. § 23.40.110(a)(4); Cal. Gov't Code § 3519(a); Conn. Gen. Stat. § 5-272(a)(5); Del. Code Ann. tit. 19, § 1307(a)(4); D.C. Code Ann. § 1-617.04(a)(4); Fla. Stat. § 447.501(1)(d); Haw. Rev. Stat. § 89-13; 5 Ill. Comp. Stat. (Continued ...)

These protections derive from collective bargaining agreements, which allow employees to engage in certain protected activities without fear that their activities will lead to dismissal. Under most collective bargaining agreements, or similar statutory provisions, public employees are permitted to file grievances related to their employment conditions. Consequently, if an employer has undertaken conduct that is alleged to violate the terms of these collective agreements, employees (or their representatives) may seek redress by filing a grievance. Indeed, Mr. Guarnieri took advantage of grievance mechanisms and prevailed *twice*. His experience is a good example of the efficacy of these types of collective bargaining agreements.

This Court has cautioned that the protections accorded by the Free Speech Clause "do[ ] not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. The Third Circuit's approach, however, would lead to this result. Here, a simple dispute involving a series of additional job responsibilities has

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315/10(a)(3); Iowa Code § 20.10(2)(d); Kan. Stat. Ann. § 75-4333(b)(4); Me. Rev. Stat. tit. 26, § 979-C(1)(D); Md. Code Ann. State Pers. & Pens. § 3-306(a)(5); Mass. Gen. Laws ch. 150E, § 10(a)(4); Mich. Comp. Laws § 423.209; Minn. Stat. § 179A.13(2)(4); Mont. Code Ann. § 39-31-401(4); Neb. Rev. Stat. § 81-1386(2)(d); N.H. Rev. Stat. Ann. § 273-A:5(I)(d); N.J. Stat. Ann. § 34:13A-5.4(a)(4); N.M. Stat. Ann. § 10-7E-19; N.Y. Civ. Serv. Law § 209-a(1)(c); Ohio Rev. Code Ann. § 4117.11(A)(4); Or. Rev. Stat. § 243.672(1)(d); 43 Pa. Cons. Stat. § 1101.1201(a)(4); R.I. Gen. Laws § 28-7-13(8); S.D. Codified Laws § 3-18-3.1(4); Vt. Stat. Ann. tit. 3, § 961(4); Wash. Rev. Code § 41.56.140; Wis. Stat. § 111.06(1)(h).

taken on constitutional dimensions. *Cf. id.* at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices . . . ."). The Third Circuit's approach effectively undermines public sector collective bargaining agreements, which already prohibit employers from discriminating against employees for filing a grievance or complaint.

* * *

Federal courts should not be forced to referee minor workplace disputes that are better suited for disposition under state whistleblower laws or collective bargaining protections. Was overtime pay improperly denied? Was an employee disciplined as a consequence of refusing to accept a job transfer? Were assigned work duties beyond the purview of contractual obligations? Was the time allotted for lunch insufficient? Each of these may be a legitimate basis for filing a personal grievance or pursuing a state remedy; but each should not be a federal claim absent a showing of public concern. Collective bargaining agreements, labor laws, and whistleblower statutes — not the First Amendment's Petition Clause — are better suited to deal with these issues, as well as allegations of employer retaliation relating to wholly personal issues. The Third Circuit's approach minimizes the importance of these legal protections. Reversing the Third Circuit will not reduce the ability of public employees to vindicate the exercise of First Amendment rights on matters of public concern; nor will it leave public employees without redress. Rather, reversal would simply bring the Third Circuit into accord with the ten circuits that have considered this

issue, and give breathing space to the state and local laws that permit public sector employees to pursue grievances and remedies for personal employment matters in the workplace.

CONCLUSION

For all of the above reasons, this Court should reverse the decision of the United States Court of Appeals for the Third Circuit.

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No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, ET AL.,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICUS[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Third Circuit Court of Appeals should be affirmed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Millions of Americans are employed by federal, state, and local governments. These citizens do not forfeit their constitutional rights as a condition of employment.

Sometimes constitutional rights must yield to overriding government interests, and courts routinely uphold reasonable time-place-manner restrictions.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

These principles hold true in the sphere of public employment, protecting the employer's legitimate interests in workplace order. However, restrictions should be narrowly tailored to serve those interests without eviscerating the First Amendment.

Rather than attempt to smooth the jagged line between "public" and "private" concerns in the employment context, the Third Circuit wisely distinguished between sham and genuine petitions. True petitions warrant formal review and offer remedies for real legal wrongs. Even as employer, the government cannot shut off the channels for citizen-employees to redress valid grievances. Importing the "public concern" test would grant employers carte blanche to retaliate and leave employees vulnerable—even for invoking the carefully crafted state remedies Petitioner alleges will be displaced without that threshold.

Respondent was initially terminated for exercising his right to be free of compelled speech concerning a matter unrelated to his job. He followed the procedures in a collective bargaining agreement the Borough signed—then faced a *second* round of retaliation for doing so. Mandating a "public concern" for the second complaint would sanction an end-run around the Constitution.

ARGUMENT

I. GOVERNMENT EMPLOYERS ARE NEVER ENTIRELY ANALOGOUS TO PRIVATE EMPLOYERS. THE GOVERNMENT MUST MAINTAIN OPEN ACCESS FOR REDRESS OF GRIEVANCES FOR *ALL* ITS CITIZENS, INCLUDING ITS OWN EMPLOYEES.

Over two centuries ago, this Court proclaimed that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

Retaliation against a public employee who petitions "violates the literal language of the Petition Clause." *Gable v. Lewis*, 201 F.3d 769, 772 (6th Cir. 2000). Even as employer, no government entity may foreclose a citizen's ability to access the judicial system for genuine grievances. Every legal right must have a remedy. *Marbury v. Madison*, 5 U.S. at 163. There is effectively no remedy for a citizen-employee who must choose between employment and the ability to formally redress an employment-related grievance. Application of the "public concern" test to petition cases "distorts a distinct right that was designed to ensure government accountability to its citizens." Margo Pave, Comment:

Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees Who File Legitimate Grievances and Lawsuits Against Their Government Employers, 90 Nw. U. L. Rev. 304, 336 (Fall 1995).

The right to petition has ancient origins and was utilized by early American colonists. It was firmly established in the common law tradition by the time the Bill of Rights was drafted. *Foraker v. Chaffinch*, 501 F.3d 231, 235 (3d Cir. 2007). Initially it encompassed a right to be free of retaliation for its exercise, and some commentators even maintain that speech, press, and assembly "originated as derivative rights insofar as they were necessary to protect the preexisting right to petition." Pave, 90 Nw. U. L. Rev. at 309-310, quoting Stephen Higginson, Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 Harv. L. Rev. 1111, 1113 (1993). The right to petition is one of "'the most precious of the liberties safeguarded by the Bill of Rights,' *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967)...implied by 'the very idea of a government, republican in form.' *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-525 (2002). This Court refused to apply the Sherman Act so as to preclude the solicitation of government action—even though petitioners intended to restrain trade. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). "[E]xcept in the most extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,' *De Jonge v. Oregon*, 299 U.S. 353, 364

(1937)." *McDonald v. Smith*, 472 U.S. 479, 486-487 (1985) (Brennan, J., concurring) ("*McDonald* ").

The government employer is still *government*—a state actor. "[A]ctions taken by the state...are subject to constitutional scrutiny"—private actions are not. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974). The doctrine of state action forecloses the attempt to split the government entity and draw a constitutional line between the government-as-employer and government-as-government. In light of the government's "concurrent role as sovereign, the government-as-employer bears constitutional responsibilities not shared by private employers." Pave, 90 Nw. U. L. Rev. at 336. The Fourteenth Amendment prohibited the government from practicing racial discrimination, even as employer, long before the Civil Rights Act of 1964 was passed. *Id.* at 335.

In spite of overlap in First Amendment rights, petitioning is substantively different than speech because it addresses a distinct audience: the government. "Whereas the Free Speech Clause protects the right to 'wide-open' debate, the Petition Clause encompasses only activity directed to a government audience." *Foraker v. Chaffinch*, 501 F.3d at 237. It is one thing for an employee to air grievances before the public, and quite another to initiate formal action seeking a remedy. Pave, 90 Nw. U. L. Rev. at 339.

Employment touches basic liberties because "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the

First Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). The government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-606 (1967). *See also Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980); *Connick v. Myers*, 461 U.S. 138, 142 (1983) ("*Connick*"); *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006). Nor can the government condition public employment on the employee's forfeiture of the right to pursue a formal remedy when the government employer transgresses his constitutional or statutory rights.

> [A] citizen who works for the government is nonetheless a citizen. The *First Amendment* limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.

Garcetti v. Ceballos, 547 U.S. at 419. One of those liberties is access to a legal remedy for a government employer's wrongdoing.

A. Most Circuit Courts Gloss Over The Distinction Between The Petition Clause And Other First Amendment Rights.

The Petition Clause is not a superfluous appendage to the First Amendment. It is a right with independent significance:

> It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

Marbury v. Madison, 5 U.S. at 174.

Many Circuit Court decisions conflate the public employee's rights to speak and petition—repeating *Connick's* "public concern" test with little (if any) analysis or rationale:

- *Tang v. Dept. of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998) (glides over the right to petition, rehashing the *Connick-Pickering* standard for free speech)

- *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (presumes petition right is "generally subject to the same constitutional analysis" as free speech—based on a footnote in *Wayte v. United States*, 470 U.S. 598, 610 n. 11 (1985), a case that did not involve public employment and did not separately analyze speech and petition rights because the petitioner had not argued that each right was burdened differently)

- *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009) (found viable petition claims but failed to discuss Petition Clause in depth—impliedly assumes applicability of "public concern" test)

- *Kirby v. City of Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2004) (discusses Petition Clause but relies on generalizations in *McDonald* that

it is "cut from the same cloth" and "inspired by the same ideals" as other First Amendment protections)

- *Brinkmeyer v. Thrall Indep. Sch. Dist.*, 786 F.2d 1291, 1294 (5th Cir. 1985) (assumes that *Connick* applies to all "public employee claims under the First Amendment")

- *Day v. S. Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985) (Petition Clause applies when *other* First Amendment rights are implicated)

- *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989) (conflates speech and petitioning, assuming "public concern" test applies to both)

- *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988) (glosses over the distinction between speech and petitions, noting that libel is not protected under either clause)

- *Altman v. Hurst*, 734 F.2d 1240, 1244 n. 10 (7th Cir. 1984) (conflates "First Amendment rights" under *Connick* and says that "a private office dispute cannot be constitutionalized merely by filing a legal action")

- *Hoffman v. Mayor of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990) (merges speech and petition rights, holding they are "cut from the same cloth" and thus the court need not determine "if (or how) the petition clause is distinct from the speech clause or whether Hoffmann's grievance filing was an act of petition or of speech")

- *Gunter v. Morrison*, 497 F.3d 868, 872 (8th Cir. 2007) (conflates the rights of speech and petition, based on *Hoffman's* holding that it "need not determine" whether the Petition and Free Speech Clauses are distinct)

- *Rendish v. City of Tacoma*, 123 F.3d 1216, 1219-1220 (9th Cir. 1997) (conflates petition and speech rights, assuming "public concern" applies test to both, but admits that Petition Clause independently protects litigation)

- *Martin v. City of Del City*, 179 F.3d 882, 887 (10th Cir. 1999) (conflates speech and petition, assumes *Connick* standard applies to both)

- *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984) (assumes "public concern" test applies to employee grievance)

- *D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1211 (11th Cir. 2007) (assumes that "public concern" test applies to petition activity, relying on *McDonald's* "cut from the same cloth" dicta)

The Petition Clause independently protects the right to have a meritorious complaint heard and adjudicated. But these Circuits give short shrift to this right, collapsing it into the Free Speech Clause without considering that a different audience is addressed and different purposes are served. The Petition Clause provides access to a potential remedy, not merely the opportunity to "air" opinions.

> [T]hese decisions conflate two distinct constitutional rights...the act of petitioning

> itself is given no protection; only the speech contained within the petition is constitutionally protected, and then only if it satisfies the standard for protection applicable under the Free Speech Clause. This approach robs the Petition Clause of any independent meaning and ignores its history as a distinct and significant source of protection.

Pave, 90 Nw. U. L. Rev. at 326.

The other circuits are not quite as uniform as Petitioner asserts. Although *most* other circuits depart from the Third Circuit's analysis, Petitioner ignores Sixth Circuit precedent with the claim that *all* ten other circuits "have uniformly held that claims like respondent's are not cognizable." App. Brief, 4. Petitioner's lone Sixth Circuit citation refused to extend the "public concern" test to the speech of *parents—not employees*—who criticized a school district. App. Brief, 5, citing *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008). Elsewhere—in a case *Jenkins* found dispositive (*id.*)—the Sixth Circuit stated that:

> [W]e find no authority in the Sixth Circuit limiting petitioning activity by public employees to matters of "public concern" either generally or in the governmental employment context.

Gable v. Lewis, 201 F.3d at 771-772 (auto towing company owner sued police official for removing her from the patrol's referral list in retaliation for her sex discrimination complaint). In *Gable*, the Sixth Circuit looked back to *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220 (6th Cir. 1997), where *one* judge

would have limited employee petitions to "public concerns" but *three* others—two concurring judges and one dissenting—disagreed. In *Valot*, school bus drivers were not rehired for the next school year because they applied for unemployment benefits over the summer, not realizing the School Board would have to pay those benefits dollar-for-dollar. The concurring judges did not consider the unemployment applications to be "petitions," noting there is no *constitutional* right to these benefits. *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1230-31 (6th Cir. 1997) (Ryan, J., concurring). The dissent would have protected the employees because they successfully invoked a *statutory* right. *Id.* at 1234 (Merritt, J., dissenting).

Outside the Third and Sixth Circuits, other courts cite broad statements—often dicta—about how First Amendment rights were "coupled in a single guaranty" (*Thomas v. Collins*, 323 U.S. 516, 530 (1945)), "cut from the same cloth" (*McDonald*, 472 U.S. at 482) or "inspired by the same ideals" (*id.* at 485). But "[t]he *Connick* Court was not faced with a claim of violation of rights of association and petition." *Stellmaker v. DePetrillo*, 710 F. Supp. 891, 892 (D. Conn. 1989) (teacher transferred to less desirable post in retaliation for pursuit of collective bargaining grievance). Similarly, *McDonald* was not faced with a meritorious petition about any constitutional or statutory violation—but with libel. Free expression does not encompass the right to defame or deceive. Intentional falsehoods are not protected under any constitutional clause. Neither *Connick* nor *McDonald* should not deny protection for an employee's meritorious, non-sham grievance.

B. Only Sham Or Libelous Petitions Are Beyond The Reach Of The First Amendment.

Petitioner argues that the "public concern" test is necessary to prevent employees from characterizing every grievance as a petition and every response as unlawful retaliation. App. Op. Brief, 13, 14. But the Petition Clause only protects genuine, non-sham grievances that warrant formal action. "[It] does not provide blanket immunity for unlawful conduct." *Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) (conviction for telephone harassment). *See also City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (police officer could be terminated for distributing sexually explicit videos). Some expression—libel, intentional misrepresentation (fraud), frivolous litigation—is not protected by *any* constitutional provision.

> Constitutional rights have outer limits. Other than the right to believe [*Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940)], none is absolute. The Free Speech Clause does not shelter defamatory speech or "fighting words." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The right to petition is also not absolute. *McDonald*, 472 U.S. at 485. But not all rights have identical parameters. The Third Circuit's thorough analysis defined the contours of the Petition Clause by distinguishing between true and sham petitions, concluding that "[t]he mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee." *San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994); *see also Foraker v. Chaffinch*, 501 F.3d at 236; *Brennan v. Norton*, 350 F.3d 399, 417 (3d Cir. 2003).

San Filippo followed this Court's precedents. Filing a lawsuit is a form of petitioning, but "baseless litigation is not immunized by the First Amendment right to petition." *McDonald*, 472 U.S. at 484, quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983); accord, *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972) (genuine petition immune from anti-trust liability, but not sham petition); accord, *BE&K Constr. Co. v. NLRB*, 536 U.S. at 525-526 (same); *see also Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (no protection for intentional falsehoods in petition to the President). *Bill Johnson's* held that an employer's suit could not be enjoined as an unfair labor practice unless it lacked a reasonable basis—even where the employer filed it to retaliate against employees exercising their First Amendment rights. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. at 743, 748-749 (employee defendants engaged in mass picketing, harassed customers, blocked entrance to employer's restaurant). But a *baseless* lawsuit could be enjoined. *Id.* at 744.

The *Bill Johnson's* complaint also contained a libel count. *Id.* at 734. Historically, the petition right recognized in England was so broad that it may have included freedom from libel prosecution for the petition contents. Pave, 90 Nw. U. L. Rev. at 308 n. 26. In *McDonald*, however, this Court held that libelous statements find no safe haven in the Petition Clause. *McDonald*, 472 U.S. at 485. Some states have enacted a "litigation privilege" extending absolute protection—even for libel. *See, e.g.*, Cal. Civ. Code § 47. While not constitutionally mandated, this privilege—like the Petition Clause—encourages free access to the courts. *Silberg v. Anderson*, 50 Cal.3d 205, 211-212 (1990). That policy is overshadowed only

when the elements for a malicious prosecution action are present (*id.*)—and in such a case, the underlying suit is baseless.

Bill Johnson's and *McDonald* are both consistent with the conclusion that "[t]rue petitions...fall within the ambit of the Petition Clause's protection, and the government that does not maintain a channel for such petitions violates a constitutional duty." Pave, 90 Nw. U. L. Rev. at 337. *San Filippo* formulated its analysis based on the distinction between sham and true petitions, rather than the petition contents. *Id.* at 332. That approach corresponds to this Court's precedent:

> "[S]ince sham litigation by definition does not involve a bona fide grievance, it does not come within the First Amendment right to petition." Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L. Rev. 39, 60 (1980).

Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. at 743.

San Filippo guards access to the judicial system for public employees without opening the floodgates for every workplace grievance. When a public employee files a meritorious action to vindicate a constitutional or statutory right, the suit is not baseless—whether or not it implicates public concerns. On the other hand, where an at-will employee sues a public employer and no such right is at stake, the employee has no legal right to continued employment and the suit is most likely baseless. See, e.g., *Tang v. Dept. of Elderly Affairs*, 163 F.3d at 13 (minor workplace inconveniences not based on race or gender or retaliation for filing union grievance).

C. When Public Employees Are Denied An Avenue For Redress Of Grievances, They Are Placed At A Substantial Disadvantage As Compared To Their Private Counterparts.

Public employees seeking a remedy for grievances face a "stacked deck"—the government stands in the dual role of employer and adjudicator, holding the keys to both employment and the redress of their grievances. If the government-as-employer can slam the courtroom door shut and ignore its constitutional obligations, the public employee has even fewer rights than a comparable private employee with a meritorious employment grievance. The injury is particularly egregious where the employee complains of an independent constitutional violation. Even an at-will public employee may not be discharged "on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. at 597. Otherwise, government could surreptitiously "produce a result which [it] could not command directly"—impermissibly penalizing and chilling constitutional freedoms. *Id.*, citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Citizens employed in the private sphere may access the judicial system for legitimate employment grievances without the "public concern" hurdle. A private employer is not subject to the same constitutional constraints as a public employer, but cannot deny an employee the right to pursue a legal remedy. "Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason." *Rutan v. Republican Party*, 497 U.S. 62, 95 (1990). The government owes no less to its own employees than to other citizens. "The First Amendment's petition clause

imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances." *San Filippo v. Bongiovanni*, 30 F.3d at 442.

1. *Connick* Widened Protection For Public Employees

"[T]he public concern test actually expanded the free speech rights of public employees. *See Garcetti v. Ceballos*, 547 U.S. 410 (noting that *Pickering* and *Connick* changed the dogma that public employees surrender all their First Amendment rights by reason of their employment)." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d at 586 n. 1. "The public concern test was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens." *Van Deelen v. Johnson*, 497 F.3d 1151, 1156-57 (10th Cir. 2007).

Connick traced the development of the law, noting that "[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick*, 461 U.S. at 143. *Connick* continued the trend of the 1950s and 1960s to acknowledge and expand public employee rights: *Wiemann v. Updegraff*, 344 U.S. 183 (1952) (striking down loyalty oath denying past affiliation with Communists); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (public employment cannot be denied because of past membership in a particular party); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (educators could not be required to list organizational memberships as condition of employment); *Torcaso v.*

Watkins, 367 U.S. 488 (1961) (religious oath for notary public struck down).

2. Denial Of Access To The Judicial System May Constitute A Denial Of Procedural Due Process.

Some public employees have a protected property interest in continued employment. If access to the courts (or a comparable formal mechanism) is denied because the dispute is "private," the "public concern" test effectively denies that employee procedural due process.

Property interests are not created by the Constitution, but "stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Public employment may or may not be protected: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (Ohio statute created property right for classified civil servants); *Bd. of Regents v. Roth*, 408 U.S. at 570-571 (professor had no tenure or statutory right to continued employment); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (independent towing company had no protected right to demand more towing assignments). But where a protected interest does exist, procedural due process is mandatory:

> While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 541 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part)).

3. Association Rights Of Employees May Be Threatened.

The Borough was obligated under a collective bargaining agreement with the Duryea Police Association. This is a classic Catch-22 that dooms the employee who successfully complies with the government employer's established grievance procedures. Guarnieri was reinstated when he exercised his rights in compliance with the Borough's contract. Opp. Pet., 1. The Borough's retaliatory acts offend Guarnieri's right to both due process and association.

Most courts do *not* subject association rights to the "public concern" test:

> Despite the instruction of the Supreme Court that the different guarantees of the First Amendment are "cut from the same cloth," *McDonald*, 472 U.S. at 482, we have not applied the same threshold legal question to public employees who argue that they were terminated in retaliation for exercise of their right to free association as we have to those who argue that they were terminated for their speech or petitions. We have long held that, unlike speech or petitions by public employees, associational activity by public employees need not be on

> matters of public concern to be protected under the First Amendment.

D'Angelo v. Sch. Bd., 497 F.3d at 1212.

But the circuits are not uniform on association claims. The Fifth, Tenth, and Eleventh Circuits would not import the "public concern" test:

- *Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 757 (5th Cir. 1993) ("A public employee's claim that he has been discharged for his political affiliations in violation of his right to freely associate is not subject to the threshold public concern requirement."), quoting *Coughlin v. Lee*, 946 F.2d 1152, 1158 (5th Cir. 1991)

- *Flanagan v. Munger*, 890 F.2d 1557, 1564 n. 7 (10th Cir. 1989) (expressing doubt that the "public concern" analysis would apply to association claims)

- *Schalk v. Gallemore*, 906 F.2d 491, 498 n. 6 (10th Cir. 1990) ("In some constitutionally protected associations, 'public concern' may be an inapt tool of analysis.")

- *Hatcher v. Bd. of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987) (principal's association rights protected)

- *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005) (school bus driver had right to participate in union-like organization)

The Second, Sixth, and Seventh Circuits would apply the test:

- *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004) (associational conduct by public employee must touch on matter of public concern)

- *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985) (same)

- *Klug v. Chi. Sch. Reform Bd. of Trs.*, 197 F.3d 853, 857 (7th Cir. 1999) (same)

This Court's precedents suggest that association rights are *not* subject to the "public concern" test: *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) ("The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so."); *Rutan v. Republican Party*, 497 U.S. at 71 (public employment cannot be conditioned on support from particular political party).

At the very least, this split cautions against thoughtlessly collapsing all First Amendment rights and ignoring their distinctions. These rights are intertwined and overlapping, but not identical.

II. THE COURT SHOULD ADOPT A TEST THAT GUARANTEES MAXIMUM PROTECTION FOR CITIZENS WHO WORK FOR THE GOVERNMENT WITHOUT SACRIFICING GOVERNMENT EFFICIENCY.

This Court should carefully carve out the circumstances where the government employer may

lawfully restrict the constitutional rights of its employees—rather than narrowly defining the situations where employees retain their rights. In *Connick*, this Court was concerned about a public employee's actions *as an employee* rather than as a citizen—and the Court made clear that its "responsibility is to ensure that citizens are [neither] deprived of fundamental rights by virtue of working for the government" nor granted "immunity for employee grievances not afforded...to those who do not work for the State." *Connick*, 461 U.S. at 147.

The Third Circuit rightly begins by asking whether the employee engaged in constitutionally protected activity. *San Filippo v. Bongiovanni*, 30 F.3d at 430. "The problem lies, however, in initially determining whether the citizen-employee's expression is, in fact, 'protected'—for if it is not, the government may restrict it without any justification at all." Pave, 90 Nw. U. L. Rev. at 333. Using the "public concern" test at the outset could facilitate viewpoint discrimination by punishing non-disruptive private speech—or other First Amendment rights—without adequate justification. This turns the Constitution on its head. Private speech ordinarily enjoys the same protection as speech on public matters. *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 223 (1967); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). "We do not suggest...that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." *Connick*, 461 U.S. at 147. If an employee has engaged in *any* constitutionally protected conduct, a court should first ask whether it actually hindered the government's legitimate interests. Employees may have a stronger interest in

addressing public concerns but they also retain a protected interest regarding private matters.

Government employers do have valid concerns about efficient workplace management this is common sense. Public employees have no right to use "offensive utterance[s] to members of the public or to the people with whom they work." *Waters v. Churchill*, 511 U.S. 661, 672 (1994). A public entity may employ reasonable restrictions to accomplish its mission, which is funded by public money. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 674-675.

The public employer's authority in the workplace parallels the time-place-manner restrictions that government may place on First Amendment rights generally. During working hours and at the employer's place of business, the employer may place reasonable constraints on speech and conduct that would otherwise be impermissible.

But even a "legitimate and substantial" government purpose "'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)." *Keyishian v. Bd. of Regents*, 385 U.S. at 602. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* at 605-606. Employer restrictions on constitutional

rights should actually serve the government's interests.

> A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Garcetti v. Ceballos, 547 U.S. at 418. In *Pickering*, the case that established the balancing test applied in *Connick*, no close working relationships were involved and there was no interference with either the teacher's job performance or school operations. *Pickering v. Bd. of Educ.*, 391 U.S. at 570, 572-573. More recently, this Court held that a public employer must have some government justification "far stronger than mere speculation" to regulate an employee's off-hours speech on topics unrelated to his employment. *United States v. Treasury Emps.*, 513 U.S. 454, 465 (1995) (federal employee had right to speak, write, and earn outside income in spare time). Here, this Court observed that none of the employee's speech "even arguably [had] an adverse impact" on the employer. *Id.*

A wholesale importation of the "public concern" test into the Petition Clause would broadly restrict access to the judicial system without necessarily serving a legitimate government interest. The test makes no sense where an employee, acting in good faith, utilizes the courts or a formal procedure established by the employer to resolve grievances. It is questionable if stretched beyond the workplace. "*Connick* created the public concern test because government agencies need the ability to maintain order in their workplaces, which [is] inapplicable to the situation of a private

individual petitioning the government for the redress of grievances." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d at 587 ("public concern" test inapplicable to parents criticizing school officials).

Connick itself reiterated the caution this Court expressed in *Pickering*:

> Because of the enormous variety of fact situations in which critical statements by ... public employees may be thought by their superiors ... to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Connick, 461 U.S. at 154, quoting *Pickering v. Bd. of Educ.*, 391 U.S. at 569.

A. In The Context Of Employer-Employee Relationships, The Line Between Public And Private Concerns Is Often Blurred.

Petitioner laments the complexity of distinguishing a "petition" from simple speech. App. Op. Brief, 31. But the Third Circuit cases Petitioner cites for this lack of clarity are integrally related to formal actions in the employment context – e.g., consulting an attorney, giving notice of intent to file suit, requesting a public hearing. *Id.* The intricacy of separating "public" from "private" presents formidable challenges. If an employee's constitutional or statutory rights are violated, is that a purely *private* matter? Unlawful discrimination concerns a particular employee—but may expose a wider pattern. What if there are multiple "layers" of retaliation, but only one implicates

public concerns? What if an employee's "private" grievance reveals underlying government mismanagement or corruption?

Some cases have identified public concerns where the employee's speech or petition is arguably private. In one case, a city utilities employee sued the city over its refusal to approval his plans for building a residence and access road on parcels he had purchased. This seemingly private lawsuit—unrelated to the plaintiff's job—satisfied the "public concern" test. *Gunter v. Morrison*, 497 F.3d 868. A Presidential assassination attempt is a matter of grave public concern, but what about a casual, inappropriate comment made privately to a co-worker? *Rankin v. McPherson*, 483 U.S. 378 (1987) (deputy constable terminated when a co-worker overheard a comment she had made about an assassination attempt ["if they go for him again, I hope they get him"]). In *Rankin*, this Court found that the "inappropriate or controversial character of [the] statement [was] irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387. Yet this remark "is a far cry from the question by the Assistant District Attorney in *Connick* whether her co-workers 'ever [felt] pressured to work in political campaigns.'" *Id.* at 397 (1987) (Scalia, J., dissenting). It also pales in comparison to the serious expression of other plaintiffs: *Pickering v. Bd. of Educ.*, 391 U.S. at 566 (letter to Board of Education about financing school construction); *Perry v. Sindermann*, 408 U.S. at 595 (teacher's legislative testimony); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (letter regarding teacher dress and appearance); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979) (teacher privately expressed concerns to her principal

about the school's racial discrimination). Parsing the public-private distinction is indeed challenging.

At times the public concern is obvious—but not always. *Garcetti* added another layer of analysis by requiring that the employee speak as a private citizen, not as a public official. Although the latter expression is "government speech" governed by a different set of principles, the new test adds complexity—particularly since public employees may be best situated to know about internal matters that concern the public. The Ninth Circuit grappled with this issue in the past—but *Garcetti* might now foreclose these plaintiffs' actions: *Gillette v. Delmore*, 886 F.2d 1194, 1196 (9th Cir. 1989) (firefighter's comments to fire captain about use of excessive force in taking drug overdose victim to the hospital); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (memorandum "exposed abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetence of public law officials at Juvenile Hall"), *Voigt v. Savell*, 70 F.3d 1552 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1826 (1996) (state court clerk terminated for criticizing presiding judge's selection of court administrator and determining that an employment applicant's grievance was valid—the unfair discrimination was a public concern).

Multi-tiered retaliation introduces another complicating factor. The Fourth Circuit considered the case of a police officer who testified truthfully about a fellow officer's failure to maintain his vehicle—a private concern. *Kirby v. City of Elizabeth City*, 388 F.3d at 449. But retaliation occurred in response to Kirby's truthful testimony—retaliation that could have a chilling impact on officers called to testify in future inquiries. Here the court found a public concern. *Id.*

Guarnieri's case arguably satisfies the "public concern" requirement, in light of the original events that triggered his grievance and the implications of the retaliatory directives:

- The original discharge occurred after Guarnieri refused the Council's request that he lobby the Mayor to sign a proposed ordinance unrelated to his job with the Police Department. Opp. Pet., 1. This is a classic example of compelled speech, and the proposal—about a reorganization of the Sewer Authority—arguably concerns the public.

- On close examination, the directives implicate public concerns. The prohibition of overtime may seem "purely private," but public safety is jeopardized if the police chief must abruptly stop working at a particular time even if he is handling an arrest or other emergency. Opp. Pet., 3.

The public concern test is helpful if used as a shield to protect the ability of public employees to participate in public discussions. But this content-based test should not be employed as a sword to create a "judicially approved catalogue of legitimate subjects of public discussion" that severely narrows the First Amendment. Pave, 90 Nw. U. L. Rev. at 314 n.58, citing Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 3 (1990).

Even federal courts disagree about what is or is not a matter of "public concern" in the operation of a government agency. How can the average

employee—with a meritorious, non-sham claim—be expected to second-guess the courts and decide whether to gamble on losing his livelihood?

1. The Efficient Operation Of *Any* Government Entity Is A Matter Of Public Concern.

Even in *Connick*, the public-private dividing line was disputed among this Court's justices. Justice Brennan observed that the operation of the government *always* concerns the public:

> It is hornbook law...that speech about "the manner in which government is operated or should be operated" is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Connick, 461 U.S. at 156 (Brennan, J., dissenting). In *Connick*, the questionnaire at issue contained questions relevant to the operation of the district attorney's office, but only one of them ultimately passed the "public concern" threshold, contrary to the District Court finding that "[taken] as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." *Myers v. Connick*, 507 F. Supp. 752, 758 (E.D. La. 1981). Important public issues "are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment." *Garcetti v. Ceballos*, 547 U.S. at 448

(Breyer, J., dissenting). Government employees routinely handle matters vital to public health and safety—"police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on." *Id.* Even the relationship between a public entity and an official—like the Borough's relationship with its police chief—concerns the public. *Perry v. Sinderman*, 408 U.S. at 603 (Burger, C.J., concurring) ("the relationship between a state institution and one of its teachers is essentially a matter of state concern").

The public employer in this case is the police—an entity with urgent duties to the public. Although some of the Borough's directives address routine internal matters, the austere limitation on working hours potentially threatens public safety. The Fourth Circuit considered the critical importance of uninhibited, truthful testimony by police officers, finding that "there is a strong public interest in ensuring that that process is not compromised." *Kirby v. City of Elizabeth City*, 388 F.3d at 450. "This is particularly true in the law enforcement arena. *See Brawner v. City of Richardson*, 855 F.2d 187, 191-192 (5th Cir. 1988) ('The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department.')." *Id.*

"[T]he threat of dismissal from public employment is...a potent means of inhibiting speech." *Pickering v. Bd. of Educ.*, 391 U.S. at 574; see *Keyishian v. Bd. of Regents*, 385 U.S. at 604. This Court "[has] frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 543. A public employee may

be in the best position to know about government abuses—particularly wrongdoing that has a personal impact—but has the most to lose, either by speaking up *or* filing a valid petition to redress the grievance. Further expansion of the "public concern" test, threatening employees whose grievances are serious enough to warrant formal action, would only exacerbate the problem. "As a result, the public [could] be deprived of valuable information with which to evaluate the performance of elected officials." *Connick*, 461 U.S. at 170 (Brennan, J., dissenting).

2. A Dispute That Superficially Appears "Private" May Mask Underlying Government Wrongdoing That Should Be Exposed.

The public has a substantial interest in government transparency and accountability, but "the public matters standard, when applied to public employee petitions, allows government employers to avoid the very check on incompetence, corruption and waste that petitions are best designed to provide." Pave, 90 Nw. U. L. Rev. at 341. An ostensibly "private" dispute could be a cloak for underlying government mismanagement, inefficiency, corruption, or violation of constitutional rights. A "private" action for sexual harassment might expose a larger pattern of corruption that erodes employee morale and undermines the government agency's efficiency. Exposure promotes government efficiency rather than hindering it. Even in *Garcetti*, this Court cautioned that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance." *Garcetti v. Ceballos*, 547 U.S. at 425. Similarly, *Connick* reminded public employers that they should,

"as a matter of good judgment," be "receptive to constructive criticism offered by their employees." *Id.*, quoting *Connick*, 461 U.S. at 149.

Petitioning can be a "wholesome restraint upon official corruption, extravagance, and maladministration." *Ambrosius v. O'Farrell*, 119 Ill. App. 265, 270 (1905) (no libel recovery allowed for good faith petition to city council alleging that an official had committed a crime). Citizens employed by the government may be best situated to spot these problems and bring them to light. *Pickering v. Bd. of Educ.*, 391 U.S. at 572 (teachers have informed opinions about the allocation of school funds). The employee's right to disseminate information—or formally address the wrongdoing in a petition—is not the only interest at stake. The public also has a right to receive the information. *City of San Diego v. Roe*, 543 U.S. at 82 (2004).

Government wrongdoing encompasses constitutional violations. "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution." *Bd. of Regents v. Roth*, 408 U.S. at 582 (Douglas, J., dissenting) (no reason given for non-renewal of teacher's contract). Such violations always concern the individual(s) involved, thus implicating "private" concerns, yet the public also has an interest in assuring that government bodies comply with the Constitution.

B. The Petition Clause Protects A Public Employee's Formal Action For The Government Employer's Violation Of An Independent Constitutional Right—Whether Or Not It Implicates A "Matter Of Public Concern."

Government employers must respect a variety of constitutional freedoms—thought, religion, association, and the privilege against self-incrimination. *See Cole v. Richardson*, 405 U.S. 676 (1972) (invalidating loyalty oath); *Torcaso v. Watkins*, 367 U.S. at 490 (invalidating religious oath); *Shelton v. Tucker*, 364 U.S. 479 (invalidating required list of associations); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956) (striking down mandatory termination of city employees invoking the Fifth Amendment). Not all of these involve public concerns. If a government employer is free to retaliate against an employee who successfully pursues a formal remedy for the violation of one of these rights, any victory the employee achieves will ring hollow. Such retaliation effectively conditions employment on the sacrifice of basic rights and is unconstitutional even for an at-will employee who has no protected right to employment. *Perry v. Sinderman*, 408 U.S. at 596-597. *See also R.R. Trainmen v. Va. Bar*, 377 U.S. 1, 7 (1964) (state cannot indirectly infringe rights to association and petition through regulation of attorneys).

Judicial deference to government employers must be exercised with one eye on the Constitution:

> In the *absence* of any claim that the public employer was motivated by a desire *to curtail or to penalize the exercise of an employee's*

> *constitutionally protected rights*, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.

Bishop v. Wood, 426 U.S. 341, 349-350 (1976) (emphasis added).

Many of the Circuit cases are distinguishable because no constitutional rights are implicated—and legitimate business concerns overshadow any retaliatory motive: *Tang v. Dept. of Elderly Affairs*, 163 F.3d at 12 (minor workplace inconveniences), *Martin v. City of Del City*, 179 F.3d at 884 (lateral transfer of employee accused of sexual harassment), *Hoffman v. Mayor of Liberty*, 905 F.2d at 231 (disrespectful, abusive police employee rehired to lower position to prevent contact with the public), *Renfroe v. Kirkpatrick*, 722 F.2d 714 (non-tenured full-time teacher offered part-time position due to budget constraints). But in *this* case, Guarnieri's original grievance was triggered by a constitutional violation—compelled speech—when the Council insisted that he lobby the Mayor on a matter unrelated to his duties. Such official pressure is a "coercion of belief in violation of fundamental constitutional rights." *Branti v. Finkel*, 445 U.S. at 515-516. *See also Ex Parte Curtis*, 106 U.S. 371, 373-374 (1882) ("A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal.")

1. Petition Claims Often Implicate Other Constitutional Rights.

Courts examine the substance of a public employee's petition to determine whether it merits

Petition Clause protection. *Belk v. Town of Minocqua*, 858 F.2d at 1262 ("[O]nly if the substance of Belk's threatened grievance is deserving of first amendment protection does her allegedly retaliatory discharge violate the petition clause.") Petition cases often involve independent constitutional rights. *Day v. S. Park Indep. Sch. Dist.*, 768 F.2d at 701 ("Other decisions that rest in part on the right-to-petition clause involve the exercise of first amendment rights in addition to the right to petition.")

There is no cookie-cutter approach to examining constitutional claims. *Rendish v. City of Tacoma*, 123 F.3d at 1223 n. 3 ("We do not mean to imply that all First Amendment rights must be treated the same in the public employment context.") It is entirely possible that a public employee's formal grievance might implicate a constitutional right that warrants review even though it involves no public concerns—due process, equal protection, religion, association, compelled speech. Even if speech inside the workplace must relate to a "public concern" in order to accommodate the government employer's reasonable need for order and discipline in that context, this is not necessarily true of all other rights.

2. Second Level Retaliation Requires Careful Review.

An employer's wrongful conduct may set off a chain reaction. Some links in that chain may implicate only private concerns, while others involve public matters. "Second-level retaliation ... is retaliation for challenging an earlier alleged retaliatory act." *Kirby v. City of Elizabeth City*, 388 F.3d at 449. Officer Kirby alleged two levels of retaliation—first, a reprimand for his

testimony; second, a demotion for filing a grievance and lawsuit. Although the content of his testimony involved a private matter, the Fourth Circuit identified a matter of public concern because "the allegedly unwarranted reprimand could have a significant chilling effect on testimony relating to matters of public as well as private concern." *Id.* at 450. Similarly, a police officer stated viable petition claims related to his release of an internal memorandum to the press. *Andrew v. Clark*, 561 F.3d at 269. The memo related to the use of deadly force against a barricaded suspect—a public concern. The first level of retaliation was an internal investigation over the incident; the second level was the officer's termination for threatening to file suit. *Id.*

In multi-level situations, causation is a key factor: "[D]id retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence?" *Prof'l Ass'n of Coll. Educators v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 266 (5th Cir. 1984) (state college attempted to destroy a faculty association through intimidation and denial of privileges). If the government's "improper motive sets in motion the events that lead to termination that would not otherwise occur, 'intermediate steps in the chain of causation' do not necessarily defeat the plaintiff's claim. *Bowen v. Watkins*, 669 F.2d 979, 986 (5th Cir. 1982)." *Id.* This analysis parallels the familiar tort law notion of proximate cause. Here, the Council's improper lobbying request appears to have set in motion events that led to Guarnieri's wrongful termination and later the retaliatory directives after his reinstatement.

3. Private Causes Are Protected By The Constitution.

The First Amendment protects a broad spectrum of causes—political, religious, or even "great secular causes." *Thomas v. Collins*, 323 U.S. at 531. Rights of petition and association encompass private "business and economic interests." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. at 510-511. "[T]he petition clause itself is not generally limited to matters of 'public concern' as described in the *Connick* case but includes the petitioner's private business interests." *Gable v. Lewis*, 201 F.3d at 771.

An employee's "complaints within the chain of command" are not entitled to Petition Clause protection—as the Third Circuit concedes. *Foraker v. Chaffinch*, 501 F.3d at 247. Nor are actions undertaken in the employee's official capacity. *D'Angelo v. Sch. Bd.*, 497 F.3d 1203 (principal acted in public capacity in speaking and petitioning to have high school converted to a charter school). But when an employee files a formal action against a public employer, there will virtually *always* be private interests—continued employment, compensation, perhaps an injunction. The only reason to restrain those interests is to enable the public employer to "maintain order, disciple and civility in the workplace." *Gable v. Lewis*, 201 F.3d at 771. Such restraints should be narrowly tailored so as to minimize the constitutional burden. As this Court has repeatedly held, "laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of

dealing with such an evil." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. at 222.

CONCLUSION

Even as an employer, the government is still subject to constitutional constraints. One of these is its obligation to maintain an open avenue for all citizens—including those it employs—to seek legal remedies for genuine grievances. The Third Circuit rationale upholds that obligation by drawing the line between true and sham petitions, rather than between public and private concerns.

Respectfully Submitted,

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No. 09-1476

In The
Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, et al.,

Petitioners,

v.

CHARLES J. GUARNIERI, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL FRATERNAL ORDER OF POLICE, THE NATIONAL TROOPERS COALITION & THE PENNSYLVANIA STATE TROOPERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association respectfully submit that a public employee should be protected by the United States Constitution from retaliation by a governmental employer based upon that employee's exercise of his or her Constitutional right of access to courts or filing of a grievance pursuant to a collective bargaining agreement.

Does the Petition Clause of the First Amendment of the United States Constitution protect public employees from retaliation by their governmental employers where the employee exercises his or her Constitutional right to access to the courts or right to file a grievance pursuant to a collective bargaining agreement?

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Brief of *Amici Curiae* the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association

Now come the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association, by and through undersigned counsel, and hereby respectfully submit their Brief in support of Respondent urging affirmance of the judgment of the United States Court of Appeals for the Third Circuit.

Statement of Interest of *Amici*[1]

With this Brief, the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association (hereinafter collectively referred to as "FOP") submits the views of its more than 325,000 law enforcement members regarding the potential implications for officers in law enforcement that will result from the decision rendered by the Third Circuit Court of Appeals. The Brief will focus on:

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[1] The submission of this Brief was consented to by all parties hereto.

The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief.

1. The importance of protecting public employees from retaliatory actions of their governmental employers;

2. The use of this case to establish a workable standard for the protection of the constitutional rights of public employees.

The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities. Law enforcement officers occupy a unique niche within the realm of public employment. Although police officers undeniably occupy the most dangerous and stressful positions in the public domain, police officers are afforded the least protection in regard to their own employment. Only 24 of the 50 states recognize the right of law enforcement officers to engage in binding collective bargaining with their employers. In addition, every state prohibits law enforcement officers from striking in regard to the terms and conditions of their employment.

The FOP perspective on the issues presented in this case is unique and particularly appropriate to the substantive issues presented. Law enforcement personnel nationwide work every day to promote and ensure the safety of citizens. Yet it is this class of public employees that enjoys the least protection in regard to the security of their own employment. Failing to protect these employees from retaliatory

conduct by their governmental employers further erodes the few constitutional protections enjoyed by law enforcement, society's front line of defense.

As public servants, the members of the FOP have always recognized that the first and foremost duty of their profession is to serve society. In exchange for that commitment, law enforcement has only asked to be treated fairly by governmental employers.

It is with these interests in mind that the FOP and its membership respectfully request this Honorable Court to affirm the decision of the Third Circuit Court of Appeals and find that public employees are entitled to constitutional protection from retaliation by their governmental employers as a result of the employee exercising his or her constitutional right to access to courts or filing a grievance pursuant to a collective bargaining agreement.

Argument

I. Public Employees Should be Protected From Retaliatory Conduct of Governmental Employers in Response to that Employee Exercising His or Her Constitutional Right of Access to Courts or Filing a Grievance Pursuant to a Collective Bargaining Agreement.

The FOP is well aware that this Court has been hesitant to extend the protections of the U.S. Constitution to public employees in cases such as *Engquist*

v. Oregon Department of Agriculture, 553 U.S. 591 (2008) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, the present case presents an even more egregious set of circumstances for the public employee and is more akin to cases that have been before this Court on the issue of retaliation in the context of federal employment statutes, such as Title VII. Here, a public employee conclusively demonstrated to a neutral third party that he had been "wronged" by his public employer. This occurred when the grievance regarding his termination was granted by a neutral arbitrator and he was reinstated. Then, to literally add insult to injury, his governmental employer retaliated against him for filing and winning the grievance. The retaliation against him for the filing of the grievance was established based upon the decision of a jury in his favor.

This case presents the most egregious of circumstances for this public employee. Unfortunately, it is the position of petitioners in this case that two wrongs make a right. Specifically, Mr. Guarnieri was wronged when he was unjustifiably terminated and he was again wronged when he was retaliated against by his governmental employer for the filing of a grievance which vindicated him in regard to his unjustified termination. This Court now must decide whether such retaliatory behavior is acceptable in a constitutional law context.

A. The United States Constitution Remains One of the Few Enduring Protections for Law Enforcement Officers Against Retaliatory Conduct of Their Governmental Employers.

According to the U.S. Department of Labor, Bureau of Labor Statistics, police officers and detectives held approximately 861,000 jobs in 2006. Of that number, 79% were employed by local governments, 11% were employed by state police agencies and 7% were employed by various federal agencies. The reality of these statistics is that the vast majority of law enforcement personnel are employed at the local level of government. These officers, in cities and towns across the United States, are ever vulnerable to the whim of local politics, the absence of standardized employment policies and procedures, and little statutory protection regarding the terms and conditions of their employment.

Only 24 States recognize the right of law enforcement officers to enter into binding collective bargaining agreements with their employers.[7] In addition, officers who have the least protection from retaliatory employment decisions are those who work in law enforcement agencies which are not subject to

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[7] Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin.

collective bargaining agreements and are not subject to Civil Service laws. In many cases, these law enforcement agencies are free to treat their employees however they choose, so long as they do so in compliance with the United States Constitution and other applicable federal laws. Even in those States which have Civil Service laws applicable to law enforcement, many such laws make the decisions of Civil Service Boards either completely unreviewable in court or excessively difficult to review.[3]

Another employment issue that uniquely affects law enforcement personnel is the continued blurring of the line between on-duty and off-duty conduct. Many municipalities currently have regulations regarding both the off-duty conduct of police officers and conduct which is defined as "unbecoming" an officer.[4] The intense media scrutiny felt by police officers regarding even day-to-day job responsibilities as well as off-duty conduct results in political pressure for both the governmental employer and the

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[3] *See, e.g., Billings v. Civil Serv. Comm'n*, 154 W.Va. 688, 178 S.E.2d 801, syllabus (1971) ("[a] final order of the Civil Service Commission based upon a finding of fact will not be reversed by this Court upon appeal unless it is clearly wrong."); *City of Detroit v. Detroit Lieutenants' & Sergeants' Ass'n*, No. 250424, 2005 WL 387647, *1 (Mich.Ct.App. Feb. 17, 2005) (stating that even "silly" fact finding by an arbitrator must be upheld on review).

[4] Thomas Martinelli, *Minimizing the Risk of Defining Off-Duty Police Misconduct*, The Police Chief, vol. 74, no. 6, June 2007, at 40-45.

officer.[5] Because of the higher standard to which police officers are held and the resulting political and media pressure which comes to bear, police officers are uniquely vulnerable to politically motivated, arbitrary and retaliatory employment action. As stated above, in many jurisdictions where officers have no binding collective bargaining rights and no civil service protection, constitutional rights claims may be the only recourse for aggrieved officers.

B. The Court Should Analyze a Public Employee's Right To Be Protected From Retaliation In This Context As Broadly As It Has Analyzed Anti-Retaliation Issues in Other Contexts.

There is no dispute in this case that a jury found that Respondent Guarnieri's employer retaliated against him for filing a grievance to vindicate his employment rights. The only issue appears to be whether the United States Constitution should protect Respondent Guarnieri, a public employee, from such retaliatory conduct by his governmental employer.

Congress has made it clear, and this Court's jurisprudence has bolstered the position, that employers should not be allowed to retaliate against

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[5] *See, e.g., Malec v. Vill. of Oak Brook*, No. 06 C 5167, 2007 WL 1468603, *2 (N.D. Ill. May 18, 2007) (" . . . police officials have always been subject to far more detailed scrutiny and reporting requirements than ordinary employees or government workers.").

employees where that employee engages in protected conduct. In fact, this Court has sent a clear and consistent message over the past decade that retaliation against employees because of an employee's exercise of a protected right will not be tolerated, even where federal statutes are silent on retaliation. *See Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (finding that the ADEA prohibits retaliation against a federal employee even though the statute does not expressly apply); *see also, CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (finding that work place retaliation is actionable pursuant to 42 U.S.C. §1981, despite the fact that the statute is silent on retaliation); and *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that Title IX encompasses claims of retaliation for complaints of discrimination, even though Title IX does not expressly mention retaliation).

In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court stressed the importance of broadly interpreting anti-retaliation provisions in federal statutes, as protecting employees from retaliation is important in the context of the employer/employee relationship. In broadly interpreting the scope of Title VII's anti-retaliation provisions, the *Burlington* Court stated as follows:

> But one cannot secure the second objective [preventing an employer from retaliating against an employee exercising rights under the act] by focusing only upon employer actions and harm that concern employment

> and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.

Id. at 63.

Similarly, in the recent case of *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009), the Court, again, broadly interpreted the anti-retaliation provisions of Title VII to prohibit retaliation against an employee who answers questions during an employer's internal investigation. The Court stated:

> If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."

Id. at 852 (citations omitted).

As will be discussed below, an employee who exercises his or her right to access to courts or to file a grievance pursuant to a collective bargaining agreement negotiated with his or her employer, should be

treated no differently for the purposes of an anti-retaliation analysis. As this Court has recognized, protecting employees from retaliation by their employers is an important public concern.

C. The Court Has Recognized The Importance of The Constitutional Right of Access to Courts and Employees Filing Grievances Pursuant to Negotiated Agreements with Their Employers Should be Provided the Same Protection.

Although the parties to this case, as well as other *Amici*, have characterized the constitutional right at issue in this case as the "right to petition the Government for a redress of grievances," the FOP believes that the right may also be characterized as a First Amendment right of access to courts. As this Court stated in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972): "The right of access to the courts is indeed but one aspect of the right to petition." *Id.* at 510 (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Ex parte Hull*, 312 U.S. 546, 549 (1941)). In *Trucking Unlimited*, the Court ruled that antitrust laws could not be used to prohibit the filing of legitimate lawsuits, even if the intent of filing was to be anti-competitive, because to construe antitrust laws in such a way would defeat the right of access to courts and, thusly, the right to petition. *Id.* at 510-511.

In *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), this Court, though not ruling on First Amendment grounds, nevertheless noted that it had long viewed the right to sue in court as a form of petition. The Court stated, "We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *Id.* at 517 (citing *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967)).

The jurisprudence of this Court has demonstrated that the right of access to courts is a crucial aspect of petitioning the government. In *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 733 (1983), the Court held that the National Labor Relations Board cannot enjoin as an unfair labor practice a legitimate lawsuit by an employer, even if the employer's only reason for initiating the suit was to retaliate against an employee's proper exercise of his rights under the National Labor Relations Act. *Id.* at 743. The Court held that the employer's right of access to a court was too important to be censured as an unfair labor practice, even when the sole object of the lawsuit was to enjoin an employee from exercising a protected right. *Id.* at 741.

The Court has also emphasized the importance of the right of access to courts in other contexts such as Eleventh Amendment immunity and the Americans with Disabilities Act. Specifically, in the case of *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), the Court held that Title I of the ADA (authorizing suits for employment

discrimination) did not abrogate Eleventh Amendment immunity for the States. However, in *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court ruled unanimously that a prisoner could proceed with his Title II ADA claims for damages against the State of Georgia to the extent that his claims alleged independent violations of the Constitution, specifically, access to courts and judicial services.

Having clearly established the right of access to courts to be a precious one, there is no rational argument that the use of an agreed-upon grievance procedure be provided any less deference. In this case, the retaliation against Mr. Guarnieri by his employer occurred following his utilizing a successful grievance procedure. That grievance procedure had been agreed upon between him and his employer for the purposes of avoiding the institution of litigation. There is no legitimate reason to treat grievances filed pursuant to an agreed-upon grievance procedure any differently than claims filed in courts.

Nearly twelve million Americans are employed by federal, state or local governments. U.S. Bureau of Labor Statistics, Statistical Abstract of the United States (2007). As one author has stated, "[t]he Constitution and the Bill of Rights developed in an era when the primary relationship between the state and the citizen was that of governor and governed. Today, the relationship is often one of employer and employee." Margo Pave, *Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees Who File Legitimate Grievances*

and Lawsuits Against Their Government Employers, 90 Nw. U. L. Rev. 304, 336 (1995) (quoting the Supreme Court, 1982 Term, 97 Harv. L. Rev. 164, 169 (1983)).

This Court has made it clear in recent decisions that federal policy favors arbitration of labor disputes and conflict resolution procedures contained in collective bargaining agreements should be viewed as a favored means of resolving employee grievances. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that an agreement contained in a securities exchange's registration obligating the employee to arbitrate all claims against his employer was enforceable with respect to the employee's claim under the Age Discrimination in Employment Act. As stated by the *Gilmer* Court:

> The Court in . . . *Gardner-Denver Co.* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitration process," however, has been undermined by our recent arbitration decisions. "We are well past the time when judicial suspension of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

Id. at 34 n.5 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985) (internal citations omitted)).

The Court extended its holding beyond securities exchange's registrations to employment contracts generally in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In the case of *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009), this Court held that a collective bargaining agreement that requires arbitration of Age Discrimination in Employment Act (ADEA) claims, "is enforceable as a matter of federal law." *Id.* at 1474. In noting that the collective bargaining procedure was a satisfactory method to resolve claims under the federal employment statute at issue, the Court stated, "Parties generally favor arbitration precisely because of the economics of dispute resolution . . . as in any contractual negotiation, a union may agree to the inclusion of the arbitration provision in a collective-bargaining agreement in return for other concessions from the employer." *Id.* at 1464 (citing *Circuit City*, 532 U.S. at 123). In so holding, this Court has found that grievance and arbitration procedures pursuant to a collective bargaining agreement should receive the same legal recognition as if the claims were adjudicated in a court setting. As such, the fact that Mr. Guarnieri, in this case, filed a grievance to adjudicate his employment rights, as opposed to filing a lawsuit, should have no bearing on whether his actions should be protected from retaliatory conduct by his governmental employer.

Conclusion

This Court has repeatedly held that employees should be protected from the retaliatory conduct of their employers. This case presents the Court with the question of whether it will protect an employee who has demonstrated both that he was wrongfully terminated and that he was subsequently retaliated against for seeking to vindicate himself. The United States Constitution remains one of the few enduring protections for law enforcement officers against retaliatory conduct by their governmental employers. The public employees who risk their lives every day to enforce the laws of the United States should be entitled to protection under the very laws they are sworn to uphold. This Court has recognized the importance of the constitutional right of access to courts, and employees filing grievances pursuant to negotiated agreements with their employers should be provided the same protection.

Based upon the foregoing, the National Fraternal Order of Police, the National Troopers Coalition and the Pennsylvania State Troopers Association request this Court to uphold the judgment of the United States Court of Appeals for the Third Circuit and find that the Petition Clause of the First Amendment protects public employees from retaliation by their governmental employers where the employee exercises his or her constitutional right to access to courts or

right to file a grievance pursuant to a collective bargaining agreement.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Through its state associations NSBA represents the nation's 95,000 school board members, who, in turn, govern approximately 15,000 local school districts. These school districts employ over 6 million teachers[2] and another approximately 6 million non-certificated staff, including paraprofessionals, custodians and other building maintenance personnel, school psychologists and social workers, bus drivers, and food service workers. Taken as a whole, public school districts are the nation's single largest government employer.[3] NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the obligation of public schools to promote the efficiency of the public education system, and the private interests of employees affected by governmental action.

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[1] This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

[2] U.S. Census Bureau, Census 2000 Special Employment Opportunity Tabulation, *available at* http://www.census.gov/hhes/www/eeoindex/page_c.html?.

[3] In comparison, as of January 1, 2003, 1.4 million people were on active duty in the U.S. military with an additional 1.3 million people in the National Guard and Reserves. U.S. Census Bureau, Facts for Features – U.S. Armed Forces and Veterans, *available at* http://www.census.gov/Press-Release/www/2003/cb03-ff04se.html.

NSBA submits this brief to emphasize the significant adverse impact that affirming the Third Circuit's decision would have on the operation of our nation's public schools.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the rights of a public employee when acting not as a citizen, but as an employee, may and must be abrogated in order to balance the needs of public entities to effectively manage their internal affairs. This Court's line of First Amendment cases is very instructive, appropriately drawing the line of protection between an employee's speech as a citizen on matters of public concern and expression that is made as part of an employee's job duties or that involves a matter of private concern. This distinction is critical to the ability of public schools to make employment decisions that further their educational mission to provide students with a safe learning environment conducive to acquiring the knowledge and skills they need to become productive, responsible citizens. School district officials understand that these decisions must respect the critical balance between the rights of their employees and their interests in ensuring effective management of public schools. If the Third Circuit's reasoning with respect to the Petition Clause prevails before this Court, it will wreak havoc on this balance and override the multitude of already-existing protections held by man of our nation's 12 million school employees, protections which have been carefully crafted to achieve an appropriate balance between worker rights and an

efficient education system. It will lead to the commitment of substantial additional amounts of time and money by already-strapped school districts that need to spend their limited resources on the education of students, not additional litigation, when ample school district employee protections already exist.

ARGUMENT

I. Application of the *Connick* public concern Analysis to Employee Expression Is Essential to School Districts' Effective Management of Their Workforce To Accomplish Their Educational Mission and To Minimize Expenditure of Scarce Resources on Unnecessary Litigation.

The courts have long refused to allow public employees to transform personal disputes with employers into constitutional claims, recognizing the operational needs of the public employer. *Connick v. Meyers*, 461 U.S. 138 (1983).[4] This is especially important in the case of public schools where expression itself is implicated in the very nature of

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[4] "Although in a sense any events which transpire in a public school are matters of public concern, we have recently quoted *Connick* as stating, '"To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark ... would plant the seed of a constitutional case."' *Vukadinovich v. Bartels*, 853 F.2d 1387, 1390 (7th Cir. 1988) (*citing Hesse v. Board of Educ.*, 848 F.2d 748, 752 (7th Cir. 1988) (*quoting Connick*, 461 U.S. at 149)).

the employment relationship. For this reason, it is important to understand *Connick's* public concern requirement as a threshold that excludes from First Amendment protection employee speech, that is a function of official job duties[5] (i.e., instructional speech) and employee speech undertaken through an employment grievance or complaint. Neither constitutes expression on a matter of public concern. To remove this requirement because the employee speech ostensibly falls under the Petition Clause is to limit the ability of public school districts to achieve their mission.

A. Absent application of *Connick*, even under a very narrow view of protected expression under the Petition Clause, thousands of school employees would receive constitutional protection for what are essentially private employment disputes.

The refusal to apply *Connick's* public concern requirement could have the disastrous effect of raising tens of thousands of heretofore routine employment grievances filed by school employees under statewide grievance systems or pursuant to collective bargaining agreements into federal constitutional cases. The numbers boggle the mind. For instance, during the 2003-04 school year, New York City teachers filed 3,482 such grievances. Most commonly, the grievances involved class size and charges that school system administrators were

[5] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

micro-managing teacher's daily performance.[6] Significantly, the large number of grievances filed is not limited to urban centers. In 2008, teachers in West Virginia filed 592 grievances, representing about a third of all the formal employee complaints handled by the statewide public employee grievance system.[7]

Typically, school employees can bring grievances with respect to a wide variety of employment matters such as pay, hours, working conditions, health benefits, leave, promotions, vacations, insurance, discipline, seniority, layoffs, class size, re-hiring, resignation, termination, or other rights and benefits afforded by their union contracts. Because the *Connick* public concern requirement acts as a threshold beyond which public employees cannot cross without a bona fide constitutional claim, school employees who file grievances on such matters are not endowed with constitutional protection; the expression generally involves a private dispute an individual employee has with the school district.[8] While a savvy lawyer could argue that a particular issue, such as class size, is not simply a bargained term of employment,

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[6] Kathleen Lucadamo, *Teachers' Pet Peeves*, New York Daily News, 2005 WLNR 25247361 (February 21, 2005).

[7] Ry Rivard, *Teacher hiring overhaul urged*, Charleston Gazette & Daily Mail, December 8, 2009, at 1A.

[8] In *Weintraub v. Board of Educ. of City of Sch. Dist. of City of New York*, 593 F.3d 196 (2d Cir. 2010), the Second Circuit held that the filing of a grievance by a teacher about his supervisor's failure to discipline a child in his class was speech pursuant to the teacher's official job duties and therefore was not entitled to First Amendment protection. The court noted that an employee grievance is a form of discourse that has no "relevant citizen analogue." *Id.* at 203.

but rather a matter of public concern in an attempt to gain access to constitutional protections for a routine grievance, such legal contrivances are not necessary under the Third Circuit's decision; under that ruling school district employees can invoke the protection of the Petition Clause as a form of job insurance simply by filing a grievance, a normally simple process not requiring the assistance of legal counsel.

The Third Circuit's decision also explicitly extends Petition Clause protection to lawsuits filed by public employees. While exact numbers are hard to find, it is safe to say that school employees file thousands of lawsuits against their employers every year. Under the lower court's decision here, the nature of the claim asserted is irrelevant to whether the employee garners First Amendment protection by virtue of filing a lawsuit. Claims that undisputedly raise purely private concerns endow the plaintiff with a constitutional shield that can be raised to protect against future adverse action by the school district. Even claims that lack any merit whatsoever would provide this protection, thus complicating school district efforts to discipline and terminate school employees for ineffectiveness or misconduct.

Teachers, like many public employees, are often protected by state statutes[9] and collective

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[9] In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http/www.ecs.org/clearinghouse/75/64/7564.doc; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990). This property right to

bargaining agreements[10] that give them a right to continued employment except under narrow circumstances, making discipline and termination an already difficult process. Usually, public school teachers are summarily dismissed only in the most egregious cases. More often, problematic employees go through some form of remediation and/or progressive discipline before being terminated. To avoid this outcome, such an employee could, under the Third Circuit's decision, try to save his or her job simply by filing a grievance and pointing to that "petition" as the underlying motivation for the proposed termination.

Even without the Third Circuit's unwarranted disposal of the public concern requirement with respect to grievances, the problem of disgruntled teachers interjecting First Amendment issues into what are primarily personal disputes already occurs all too often. For example, Brian Vukadinovich, a public school teacher, has over the last 20 years made what are essentially personal disputes with his employers into First Amendment claims.[11] His

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continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

[10] *See* Section II. A., *infra* at 20-21 for a detailed discussion of the protections afforded public school employees under collective bargaining agreements.

[11] *See Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988) (finding Mr. Vukadinovich's statements in the newspaper "attempting to articulate his private dissatisfaction with his termination [from a basketball coaching position] and the reasons given for it" was not a matter of public concern); *Vukadinovich v. Michigan City Area Sch.*, 978 F.2d 403 (7th Cir.), *cert. denied*, 510 U.S. 844 (1993) (finding that even if Mr.

claims have wasted a tremendous amount of resources in various district courts, the Seventh Circuit, and indeed in this Court as well. Permitting circumvention of the public concern requirement in the manner propounded by the Third Circuit in this case would simply exacerbate this problem and force courts to become "super-personnel departments," intervening unnecessarily in the operation of our nation's schools.

B. Already-stretched school district officials lack the time, resources, and expertise necessary to discern between speech and "petitions," leading to even more hesitance about disciplining employees in order to avoid the possibility of constitutional claims alleging retaliation.

As described in I.A., *supra*, public school officials face a barrage of employee complaints

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Vukadinovich's criticism of the school board for hiring a particular superintendent were constitutionally protected speech, his speech was not a factor at all in his termination; also finding that Mr. Vukadinovich could be ordered to stay away from school after he was terminated and had no First Amendment right to speak on matters of public concern at the school); *Vukadinovich v. North Newton Sch. Corp.*, 278 F.3d 693 (7th Cir.), *cert. denied*, 537 U.S. 876 (2002) (finding that even if Mr. Vukadinovich's accusations against the superintendent and school board were constitutionally protected, he could not prove that the school board's alleged reasons for terminating him, insubordination and neglect of duty, were pretextual when he was asked five times to comply with a directive, and refused to comply three times and only made half-hearted attempts to comply two times).

addressing issues ranging from classroom conditions to discrimination to overtime pay. More importantly, the complaints come in a variety of forms. Whereas one employee may simply discuss an issue with a supervisor, another may bring an issue to the union representative, another may file a formal grievance or other written complaint,[12] another may seek redress through filing a charge with an enforcement agency, and another may file a lawsuit. Because such employee complaints, including union grievances, are such common occurrences in school districts, the application of separate analyses to employee complaints that constitute petitions—as opposed to those that constitute speech—will cripple the every-day workings of school districts.

In their roles as public employers, school officials are generally aware that employees have a First Amendment right to speak as citizens on matters of public concern, and that they may not take adverse employment action against an employee in retaliation for such speech. After *Connick* and its progeny, school officials are also aware that if the employee is speaking on a matter related to his official job duties, he is not speaking as a citizen on a matter of public concern. That sort of

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[12] School districts not only must establish grievance procedures for employees to register complaints regarding matters covered by their union contracts, but are also obligated by both federal and state laws to make available complaint procedures through which employees and students may seek redress for alleged discrimination on the basis of race, gender, religion, disability, sexual orientation, national origin, etc. School districts, both as a matter of law and policy, take steps to raise awareness of these complaint procedures and to encourage their use so that problems may be addressed at the earliest point possible.

speech—whether presented in a discussion with a supervisor or as a formalized complaint—is simply an employment dispute. Indeed, most circuits have applied the *Connick* analysis to Petition Clause cases.[13] This working knowledge has guided school officials in employment disputes for decades. However, if this Court adopts the Third Circuit's heightened standard for "petitions," at least some disputes, even of a purely private nature, will now have extra protection.

School officials already terribly stretched are ill-equipped to discern the difference between expression subject to the *Connick* public concern requirement and that which entitles the employee to First Amendment protection regardless of the context and its content. Depending on the school district, an official union grievance may be filed via hard copy in the district's office, via email, by personal delivery to the union president, or some combination. At what point is such a grievance—or any employee complaint for that matter—a "petition," so that the district must be on heightened alert not to take employment action that could be deemed in retaliation for that filing?

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[13] *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004); *accord Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580 (6th Cir. 2008); *Martin v. City of Del City*, 179 F.3d 882 (10th Cir. 1999); *Grigley v. City of Atlanta*,136 F.3d 752 (11th Cir. 1998); *Tang v. Department of Elderly Affairs*, 163 F.3d 7 (1st Cir. 1998); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir. 1993); *Hoffmann v. Mayor of Liberty*, 905 F.2d 229 (8th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696 (5th Cir. 1985).

As Petitioners clearly demonstrate, the mode of expression potentially covered by the Petition Clause under the Third Circuit's decision is neither easily determined nor neatly confined. Pet. Br. 29-34 (noting difficulties courts have in making such determinations). Having to engage in such complex legal analysis at every turn will cripple the daily workings of school districts, a consequence of the operational realities of public employers already recognized by this Court in *Connick* and its progeny. On the one hand, school officials' interactions with employees will be affected—sometimes to the point of paralysis—with school districts always second guessing themselves about disciplining employees who have filed a grievance or complained so as to avoid the possibility of being subject to a lawsuit for retaliation. On the other hand, school employees looking for job security have an incentive to formalize any complaints to ensure themselves an additional layer of legal protection.[14] For example, a teacher even mildly upset that the hours of her teacher aide have been reduced, rather than speaking to her supervisor or union representative, would be wise to file an official grievance or lawsuit to protect herself from unrelated employment actions. Courts and arbitrators who resolve grievances would be flooded with these cases.

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[14] These circumstances detract from a workplace characterized by collegiality and collaboration that schools strive to create in order to promote positive learning environments. In the case of school districts, the workplace is the classroom, a microcosm of the larger school community, in which all members have a stake. Rather than encouraging communication and opportunities for improvement, the Third Circuit's ruling pushes school districts and their employees toward more adversarial interactions.

C. Effective discipline of school employees is critical to school districts' ability to meet their accountability responsibilities for student achievement and school safety.

Not only is the potential burden of litigation tremendous, but student achievement and welfare may be compromised if the Court adopts the reasoning of the Third Circuit. School districts must be able to swiftly and effectively discipline or terminate employees who put student education or safety at risk by failing to execute their responsibilities in the manner prescribed by the school board and state lawmakers. They must be able to do so without undue fear of First Amendment claims based solely upon the previous filing of a claim that constitutes a "petition."

Courts have long recognized the authority of schools to control their policies, rules, and regulations governing employment of teachers and staff. *See, e.g., Milliken v. Bradley*, 418 U.S. 717 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.") The educational mission is of such crucial importance that Justice Frankfurter noted that one of the four "essential freedoms" of a public educational institution was "to determine for itself on academic grounds *who* may teach...." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Given the heightened accountability standards for student performance that have been imposed in the

last few years,[15] it is especially critical that school boards retain control over the employee disciplinary process.

All public school districts in the country are answerable to taxpayers and to the federal government, who are increasingly holding them responsible for the academic performance of their students in myriad ways. Every state has passed some form of performance-based accountability—setting the standards for content to be taught in the classroom, conducting state-wide testing, setting targets for student learning, and critically, putting sanctions in place if student outcomes are not meeting expectations.[16] Performance-based accountability is also the centerpiece of the No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.* (2008), which connects millions of dollars in public school federal funding to student outcomes, and severely sanctions schools and districts who fail to meet the federally-required improvement on tests.

This new era of accountability is based upon the premise that school districts and their

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[15] *See* No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.* (2008); Race to the Top initiative, American Recovery and Reinvestment Act of 2009, Public Law 11-5, as amended by Public Law 111-8, March 11, 2009, § 14006.

[16] For example, since 2006, Minnesota has had an alternative system in place for evaluating and paying public school teachers. Districts participating in the program receive an additional $260 per student in state aid and additional tax levy authority. Teachers in the program are evaluated by fellow teachers and their pay is linked to the test scores of their students. Chris Williams, *More Schools Join Minn. Teacher Reform Program*, Associated Press in Bloomberg, December 8, 2010, *available at* http://www.bloomberg.com/news/2010-12-08/more-schools-join-minn-teacher-reform-program.html.

administrators are capable of not only monitoring student performance, but of making decisive managerial decisions about resources, responsibilities and structures that are connected to performance. Nothing could be closer to student performance than teacher performance. Implementing changes in teacher responsibilities and promptly correcting and/or sanctioning teachers who are unwilling or unable to meet the heightened expectations of today's classroom is imperative. For this reason, public schools must carefully supervise employees to ensure that they create an educational environment that is safe, effective, and conducive to learning. *Henerey ex rel. Henerey v. City of St. Charles, Sch. Dist.*, 200 F. 3d 1128, 1135 (8th Cir. 1999)("School districts have an interest in maintaining decorum and in preventing the creation of an environment in which learning might be impeded . . . ."). But, that function would be severely impeded, if not entirely curtailed, were an employee able to assert that any employment decision with which he disagreed was really an act of retaliation for a previous complaint the employee had made.

In *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974), this Court noted that "[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." As such, "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." *Id.* at 168. When the government actor is a public school district, such as one of the 15,000 school districts represented by the *Amicus* here, its interests are heightened all the more by its

responsibilities for student safety and welfare. This Court has recognized the importance of this "special characteristic of the school environment" in many constitutional contexts involving the rights of students. Public schools have a "legitimate need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985) (holding that school officials need not obtain a warrant before searching a student who is under their authority). "In a public school environment . . . the State is responsible for maintaining discipline, health, and safety." *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 830 (2002) (upholding school policy requiring students participating in extracurricular activities to submit to drug testing); *accord Morse v. Frederick*, 551 U.S. 393, 408 (2007) (holding that "the governmental interest in stopping student drug abuse . . . allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use.").

The "special characteristics of the school environment" which attend the rights of students also affect school districts as public employers. When a citizen is working as a public employee, the constitutional rights that employee enjoys are circumscribed by the very nature of that employment. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. This Court's policy has been "'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor*, 480 U.S. at 722, *citing Connick*, 461 U.S. at 143. This

would certainly be true where school districts take action against an employee to protect student safety. Envision a teacher who has several times used inappropriate language in his class of fourth-graders. That teacher should, at some point, be disciplined or discharged if he does not stop. If the teacher has a "petition" on file, supervisors may be reluctant to act against the employee for fear it would be seen as retaliation based on the filing of the "petition," thereby leaving him in the classroom to continue the inappropriate language. If this scenario is repeated with several different teachers, the learning environment in the school could be severely compromised, leaving students exposed on a regular basis to inappropriate adult expression. What if, instead of inappropriate language, the teacher had inappropriately touched a student? In such situations supervisors must be able to act swiftly without concern about whether the employee has protected constitutional status for a previous complaint about a purely private matter. But if the Third Circuit's approach in this case is made national, school officials may in fact feel constrained to take any adverse action against an employee who has a pending "petition" on file.[17] Such a negative impact would hinder the very educational mission schools exist to carry out.

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[17] According to a news story in *L.A. Weekly*, during the 2008 school year, United Teachers Los Angles filed 650 formal grievances on behalf of teachers alleging contract violations. Roughly 300 of those grievances were filed by teachers who got negative classroom-teaching evaluations. Beth Barrett, *LAUSD's Dance of the Lemons*, L.A. Weekly, February 11, 2010, *available at* http://www.laweekly.com/content/printVersion/854792/.

D. School districts facing dire budget crises will be forced to divert scarce resources from the classroom to litigation of "petitions," many of which are not meritorious.

The cost of defending employment matters in the guise of Petition Clause claims would divert scarce public dollars from their rightful place in classrooms across America. Unlike private educational entities, public schools rely on limited governmental resources to achieve their educational mission. These resources must be carefully allocated to pay for, *inter alia*, the following: safe and adequate facilities for educating students; quality instructional materials and programs; competitive compensation to attract qualified teachers and staff; and other operating expenses necessary for maintaining quality schools. Like all employers, public school districts incur significant legal expenses defending against lawsuits that are brought by their employees and often are unable to recover such expenses even when the school district prevails. Frequently, these funds come from a school district's general revenue treasury, the category of unrestricted monies that is usually directly tied to instructional resources, including textbooks and teacher salaries.

If the Third Circuit's approach is adopted, giving employee complaints constituting "petitions" special status beyond the *Connick/Garcetti* standard, school districts necessarily will be forced to divert scarce financial resources to defend or settle those cases—which are sure to increase in number—

regardless of their merit. Reports show that school districts already spend from $45,000 to $400,000 per year on lawsuits.[18] Cumulatively, the amount of money drained away from education and into litigation is massive. Between 2006 and 2009, for example, twelve California districts spent $98.7 million on lawsuits.[19] If school districts are compelled to spend even more of their scarce resources to defend or to settle even more claims, with potential Section 1988 attorney's fees attached,[20] the financial effect could be devastating. This is particularly so in light of the current fiscal crisis school districts across the nation are experiencing with few signs of improvement in the near future. States are facing another year of significant budget gaps, after two of the most challenging years for state budgets since the Great Depression.[21] As revenues grow ever-so slowly, demands for spending increase, and funds made

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[18] D. Schimmel and M. Militello, *The Dangers of Not Knowing: Why Your Teachers Should Be Legally Literate*, for Leadership Insider, May 2009, *available at* http://www.nsba.org/MainMenu/SchoolBoardPolicies/Newsletters/Insider-May-09.aspx.

[19] California Citizens Against Lawsuit Abuse, *Lessons in Lawsuits: The Impact of Litigation on California's Schools*, (August 2010), *available at* http://www.cala.com/images/pdf/schoolsreportfinal.pdf.

[20] Nationally school districts spend approximately $200 million a year on attorneys' fees. D. Schimmel, *supra*, n. 18.

[21] *Fiscal Survey of States*, a report published by the National Governors Association and the National Association of State Budget Officers, *available at* http://www.nga.org/Files/pdf/FSS1012.PDF. *See also* NGA news release, *available at* http://www.nga.org/portal/site/nga/menuitem.6c9a8a9ebc6ac07eee28aca95010f10a0/?vgnextoid=10be80bc9c89c210VgnVCM1000005e00.

available by the American Recovery and Reinvestment Act of 2009 disappear, states will face a funding cliff in fiscal 2012[22] that will affect funding for public schools in the majority of states. The many small rural districts already struggling would be especially hard-hit.

Of course, it goes without saying that individuals whose legal rights have been violated should be able to seek redress under the existing framework of state and federal law, but as the courts have long held, those rights must be balanced with the ability of public schools to carry out their mission, particularly when the question involves the needless conversion of an employment dispute into a federal constitutional claim in a way that increases the potential for excessive and costly litigation.

II. School Employees Have Ample Protections Against Retaliation, Making Broad Petition Clause Protection Unnecessary and Potentially Disruptive.

A. Public school employees are already protected from retaliation by federal, state and local governmental entities.

Federal, state, and local governments have adopted various measures to protect employees from employers who would retaliate or otherwise take unlawful or inappropriate actions. These include federal and state whistle-blower protection laws; labor laws; and for virtually every teacher in the United States, statutory protections which provide

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[22] *Id.*

specific due process rights concerning notice and opportunity to be heard before the school board that is recommending discipline, non-renewal or termination of the teacher's contract.[23] Finally, two-thirds of all states have collective bargaining statutes covering teachers and mandating that local school districts bargain over the terms and conditions of employment. Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in statutes. *See* Education Commission of the States, Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm.

Typically these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures. Some of these provisions allow employees to challenge acts of alleged discrimination and retaliation. *See, e.g., City Sch. Dist., Peekskill v. Peekskill Faculty Ass'n*, 398 N.Y.S.2d 693, 695 (N.Y. App. Div. 1977) (holding that teacher's claim for retaliation based on exercise of statutorily protected rights was subject to arbitration under collective bargaining agreement, as such action would not be a

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[23] *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http://www.ecs.org/clearinghouse/75/64/7564.doc, which delineates statutes in every state in the United States that provide certain job protections and due process considerations for teachers.

"just cause" dismissal); *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F. 3d 583, 587 (6th Cir. 2004)(holding that collective bargaining agreement between the teachers' union and school board created constitutional due process property interest in employment); *Glanville v. Hickory County Reorg. Sch. Dist. No. 1*, 637 S.W.2d 328, 331 (Mo. Ct. App. 1982) (holding that teacher tenure statute prohibited adverse action taken in retaliation for exercising free speech rights). Clearly, these protections serve to make an additional cause of action for alleged First Amendment violations based on the Petition Clause simply unnecessary.

In terms of substantive rights granted by statute, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions usually framed as "just cause." Typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. Procedurally, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* David M. Pedersen, "Statutory Dismissal of School Employees," Termination of School Employees: Legal Issues and Techniques §§ 10-1, 10-2 (National School Boards Association 1997). During such hearings a teacher would be able to raise the claim that the school board has no "just cause" to terminate or discipline him or her and is taking the action in retaliation for the employee's previous complaint or grievance. Moreover, all states allow teachers to appeal the school board's decisions to some entity—for example,

a state court, a tenure commission, or a state board of education. *See* Education Commission of the States, footnote 23, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*

State statutes also explicitly protect school employees from retaliation for exercising their rights, including the filing of grievances, under collective bargaining statutes or agreements. Arkansas requires school districts to adopt written grievance procedures to resolve "concerns raised by an employee" and declares that "[t]here shall be no reprisals of any kind against any individual who exercises his or her rights." Ark. Code Ann. § 6-17-208 (2010). Similarly, California makes it unlawful for a public school employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees because of their exercise of rights guaranteed" by the state's collective bargaining provisions for school employees. Cal. Gov. Code § 3543.5 (2010). Maryland law contains a similar proscription, stating that a public school employer "may not interfere with, intimidate, restrain, coerce, or discriminate against any public school employee because of the exercise of rights" under the state's teacher collective bargaining laws. Md. Educ. Code § 6-409 (2010). Ohio makes it an unfair labor practice for a public employer to "[d]ischarge or otherwise discriminate against an employee" because he has filed charges or given testimony with respect to another unfair labor practice complaint. Ohio Rev. Code § 4117.11 (2010). These statutory protections are often specifically incorporated and sometimes expanded in collective

bargaining agreements between school districts and employee organizations. Whether statutory or contractual, these rights are generally enforceable by school employees through filing charges with public employment relations boards or through the courts.[24]

In addition to the state statutory rights and remedies discussed above, the federal government has created other additional remedies. These include: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (prohibits employment discrimination based on, race, color, religion, sex, and national origin); the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (prohibits employment discrimination against qualified individuals with disabilities); the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (protects individuals who are 40 years of age or older); and the Equal Pay Act, 29 U.S.C. § 206(d) *et seq.* (protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination).

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[24] For example, the California Public Employment Relations Board has issued rulings finding violations of these provisions by school districts. *See, e.g., North Sacramento Sch. Dist.*, PERB Dec. No. 264, 7 PERC Para. 14017 (Cal. 1982) (unlawful reprimand for filing contractual grievance); *Inglewood Unified Sch. Dist.*, PERB Dec. No. 624, 11 PERC Para. 18114 (Cal. 1987) (unlawful statement that any employee who filed grievance and lost would be pressured to leave school); *Ravenswood City Sch. Dist.*, PERB Dec. No. 469, 9 PERC Para. 16040 (Cal. 1984) (unlawful threat of court action for pursuing grievance to arbitration). The New Jersey Public Employment Relations Commission (PERC) has found unlawful discrimination when employers disciplined, threatened, failed to promote, laid off and non-renewed employees because they exercised the right to file a grievance. *See, e.g., Pine Hill Bd. of Educ.*, 12 NJPER 17161 (1986); *Salem City Bd. of Educ*, 10 NJPER 15196 (1984).

Title VII, ADA and ADEA specifically prohibit retaliation against employees for opposing unlawful conduct in the workplace. The United States Equal Employment Opportunity Commission (EEOC), established by Congress, enforces all of these laws.[25] And, of course, Congress has provided private rights of action pursuant to 42 U.S.C. §§ 1981 and 1983.

This Court should not tamper with these extensive and carefully constructed measures. Given the panoply of federal, state, and local laws and regulations protecting employees of school districts, there is, quite simply, no gap in legal protections to justify dragging in Petition Clause protections designed for entirely different situations. These special factors counsel against extension of the Petition Clause in the manner set forth in the Third Circuit's decision below.

B. Broad Petition Clause protection could interfere with or undermine these protections.

The multitude of already-existing protections held by our nation's 12 million school employees have been carefully crafted by federal and state legislators, school boards, and employee unions to achieve an appropriate balance between worker rights and the needs of government to carry out its educational mission. Determining the scope of these

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[25] For fiscal year 2009, the EEOC handled 93,277 complaints. Included in these complaints were 33,613 charges of retaliation. Over 52,000 of the total complaints resulted in a No Reasonable Cause finding. U.S. Equal Employment Opportunity Commission, Table, All Statutes FY 1997-FY 2009, *available at*, http://www.eeoc.gov/stats/all.html.

protections and the available remedies to enforce them has often required intense negotiations and a process of painstaking compromise before the necessary consensus is reached to permit their codification in statute or contractual agreements. Not only does the Third Circuit's decision permit circumvention of this Court's jurisprudence concerning the appropriate balance between public employee's First Amendment rights and the need for efficient operation of government in providing public services, it also could render superfluous the public policy and financial considerations that inform the judgments of legislators when they enact laws and of public employers that bind themselves to collectively bargained contracts. For example, the time and energy public school districts spend in bargaining over grievance procedures and the resources expended to establish these procedures could be rendered all for naught if the Third Circuit's view of the Petition Clause is accepted by this Court. Under that view once a school employee registers a complaint of any kind, he or she automatically has a constitutional claim in the event the employer takes any adverse action against the employee in the future. With such a cause of action in hand, the employee has a legal trump card that can override any limitations set on the types of matters that can be grieved and thereby circumvent the procedures put in place to expeditiously handle these disputes.

CONCLUSION

For the reasons stated above and those Petitioners set forth in their brief, *Amicus* urges this Court to reject the Third Circuit's unprecedented and unwise abandonment of this Court's First Amendment jurisprudence with respect to employee speech.

Respectfully submitted,

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IN THE
Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATE AND LOCAL LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE STATE AND LOCAL LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici are organizations whose members include municipal, county, and state governments and officials throughout the United States.[1] These organizations regularly file *amicus* briefs in cases that, like this one, raise issues of vital concern to the nation's cities, counties, and states.

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that public employees' speech is protected under the First Amendment only when it involves a matter of public concern.

In the present case, the Court is asked to decide whether the Third Circuit—in disagreement with every other circuit court and every state court of last resort that has considered the question—correctly held that the First Amendment's Petition Clause nonetheless protects a private workplace grievance that does not implicate a matter of public concern merely because the grievance is aired through some formal dispute resolution mechanism.

If this Court adopts the Third Circuit's view, it will open the door for state and local government employees to make "a federal case" out of every garden variety employment dispute, seriously undermining the purpose and effect of the rule the Court recognized in *Connick*.

The resolution of this question will impact every state and local government because of its potential to unleash a torrent of federal lawsuits by public employees against their government employers based on purely private employment matters. For this reason, the *amici* have a substantial interest in this case and a unique perspective on its proper resolution.

The individual *amici* organizations are as follows:

The National Conference of State Legislatures (NCSL) is a bipartisan organization that represents state legislatures throughout the United States. One of NCSL's core missions is to improve the quality and effectiveness of those bodies.

The National League of Cities (NLC) was established in 1924 by and for reform-minded state municipal leagues. Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance; to provide programs and services that enable local leaders to better serve their communities; and to function as a national resource and advocate for the municipal governments it represents.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's counties. It advances county-related issues with a unified voice before the federal government and assists counties in finding and sharing solutions.

The International City/County Management Association is a non-profit professional and educational organization for chief appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments worldwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that when a government employer disciplines an employee for speech that is not a "matter of public concern," such discipline is not considered an abridgement of the employee's First Amendment rights because the employee's speech is not protected by the First Amendment (the "*Connick* rule"). The

Connick rule was crafted to protect government officials from the fear that their routine employment decisions would subject them to lawsuits and potential liability for constitutional torts. *Id.* at 143. The *Connick* rule therefore keeps those officials on the same plane as nongovernmental employers, who are free to discipline employers without any such fear. *Id.* at 147.

The Third Circuit has held, contrary to settled law in the vast majority of the country, that the *Connick* rule does not apply when an employee is disciplined for "petitioning" activity rather than "speech." Respondent asks that this Court affirm the Third Circuit, thereby carving out petition claims from the ambit of the *Connick* rule. As Petitioners' brief demonstrates, such a carve-out is untenable because the Petition and Speech Clauses must be considered in parity with one another. *See* Pet. Br. 16-25, 39-40.

The flaws in the Third Circuit's position become even more evident when the *Connick* rule is viewed as part of a larger body of law safeguarding the ability of government officials to perform their duties effectively, such as the qualified immunity doctrine.[2] This Court's reasoning in the qualified immunity context strongly supports consistent application of the *Connick* rule to all First Amendment claims,

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[2] *Amici* recognize that qualified immunity does not apply to local governments, as opposed to the officials who work for such entities. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). *Amici* are not suggesting that qualified immunity applies to the Borough of Duryea. Their point is rather to put *Connick* into a larger context by examining the principles that underlie both the *Connick* rule and the qualified immunity doctrine.

whether they arise from the Free Speech or the Petition Clause.

By forcing public officials to make employment decisions based on a guess as to whether a disgruntled employee is "petitioning" or just "speaking," the Third Circuit has exposed officials to the very legal uncertainty that this Court consistently has sought to minimize. The Third Circuit's misguided policy should not be allowed to become the law of the land. The decision should be reversed.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION UNDERMINES THIS COURT'S BROAD JURISPRUDENCE PROTECTING PUBLIC OFFICIALS FROM LITIGATION THAT WOULD INTERFERE WITH THE PERFORMANCE OF THEIR DUTIES.

A. *Connick* And Its Progeny Are Based On The Recognition That Public Employers Could Not Function If All Of Their Personnel Decisions Were Subject To Federal Judicial Review.

Until the mid-20th century, "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick*, 461 U.S. at 143. This Court departed from that position in a series of decisions culminating in *Pickering v. Board of Education of Township High School District 205, Will County, Ill.*, in which the Court held that the First Amendment protects a public employee's right to speak on issues of public importance. 391 U.S. 563, 574 (1968). At the same time, this Court recognized

that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those that it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. Accordingly, this Court emphasized that even where a public employee is "commenting upon matters of public concern," the employee's right to do so must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

For the next fifteen years, this Court repeatedly stressed the importance of safeguarding the interests of public employers for the reasons stated in *Pickering*. *See, e.g., U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 564 (1973) (upholding constitutionality of Hatch Act's prohibition against active political campaigning by federal employees); *Kelley v. Johnson*, 425 U.S. 238, 244-245 (1976) (upholding police department's personal appearance standards).

It was "the common sense realization that government offices could not function if every employment decision became a constitutional matter" that led this Court to establish the *Connick* rule, limiting public employees' First Amendment rights under *Pickering* to speech on matters of public concern. *Connick*, 461 U.S. at 143; *accord, e.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62, 99 (1990); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). As this Court explained in *Connick*, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147. Like their private counterparts,

"government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146-147 (First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state"); *accord, e.g.*, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008). In this Court's eyes, this "wide latitude" requires "a wide degree of deference to the employer's judgment"; government employers can discipline employees for speech acts based on the risk of a possible disruption, without having to establish that a disruption has taken place. *Connick*, 461 U.S. at 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action").

This Court echoed *Connick*'s concern with protecting public officials in subsequent cases. In *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, for example, this Court recognized that "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer." 473 U.S. 788, 805 (1985) (upholding government's limitations on employees' participation in charity drive because "[t]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs") (internal quotations omitted). Two years later, in *Rankin v. McPherson*, this Court similarly acknowledged that "public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." 483 U.S. 378, 384 (1987).

The next major evolution of the *Connick* rule occurred in *Waters v. Churchill*, 511 U.S. 661 (1994), in which this Court held that *Connick* bars a public employee's free speech claims as long as the employer reasonably *believed* that the speech was not about a matter of public concern, *even if that belief was mistaken*.[3] In doing so, this Court for the first time squarely considered the question: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?" *Id.* at 671 (plurality opinion of O'Connor, J.). In an extensive review of this Court's jurisprudence regarding the First Amendment rights of public employees, the four-Justice *Waters* plurality explained that even when employee speech is "nondisruptive" or "of value to the speakers and the listeners," this Court has "declined to question government employers' decisions on such matters." *Id.* at 674. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 674-675.

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[3] The four-Justice plurality, joined by two dissenting Justices, held that an employer's mistaken belief that an employee's speech was not of public concern would only trigger the *Connick* rule if that belief was reasonable. *Id.* at 677-79 (plurality opinion), 685 (Souter, J., concurring) (noting that the two dissenting Justices shared this position), 697 n.4 (Stevens, J., dissenting). The three remaining Justices—Justices Scalia, Kennedy and Thomas—joined the plurality in holding that the *Connick* rule applies to an employer's "mistaken belief," but would have applied the *Connick* rule to *any* instance of an employer's mistaken belief, whether the mistake was reasonable or not. *Id.* at 686-694.

Otherwise, a public official would be left to ask "not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw." *Id.* at 676.

Over the last fifteen years, this Court has not swerved from the principles animating the rules set forth in *Connick* and *Waters*. In *City of San Diego, Cal. v. Roe*, for example, this Court observed that the absence of the *Connick* rule "could compromise the proper functioning of government offices" and upheld a police department's imposition of discipline on an officer for posting an online masturbation video. 543 U.S. 77, 82-83 (2004) (per curiam). Even more recently, in *Garcetti v. Ceballos*, this Court noted the "emphasis of our precedents on affording government employers sufficient discretion to manage their operations," and echoed the *Connick* court's warnings against empowering public employees to "'constitutionalize'" their grievances. 547 U.S. 410, 417-423 (2006) (quoting *Connick*, 461 U.S. at 154) (holding that a deputy district attorney could be disciplined under the *Connick* rule for speech in an office memorandum made pursuant to his professional duties). In sum, the creation and evolution of the *Connick* rule has consistently been guided by the Court's recognition that public officials cannot function effectively if they are constantly threatened by the specter of constitutional litigation over their employment decisions.

B. Like the *Connick* Rule, The Doctrine Of Qualified Immunity Was Established To Ensure That Public Officials Can Function Effectively.

This Court first articulated the doctrine of "qualified immunity" in *Scheuer v. Rhodes*, 416 U.S.

232, 247-248 (1974) (abrogated in part by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). As initially conceived, an official enjoyed qualified immunity when she committed a constitutional violation based on a "good-faith belief" that her conduct was legal, as long as there were "reasonable grounds for the belief formed at the time and in light of all the circumstances." *Id.* at 247-248.[4]

In *Scheuer*, this Court recognized "two mutually dependent rationales" for the historical existence of official immunity: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 240. Implicit in the second of these rationales "is a recognition that [public officials] may err," and "that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242; *see also id.* at 245 ("a policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does") (internal quotations omitted).

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court explained that denying qualified immunity to public officials would "unfairly impose upon [them] the burden of mistakes made in good faith in the course of exercising [their] discretion within the scope

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[4] The *Scheuer* court distinguished qualified immunity from "absolute" immunity, under which no inquiry is made into the official's belief or its basis. *Id.* at 242-243.

of [their] official duties," and "undoubtedly deter even the most conscientious [official] from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the [public]." *Id.* at 319-320. Indeed, the "most capable candidates . . . might be deterred" altogether "from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." *Id.* at 320. *Wood* nevertheless held, in line with *Scheuer*, that a qualified immunity defense could be overcome in one of two ways: *either* (a) objectively, by showing that the defendant should have known of the illegality of her act based on clearly established law at the time; *or* (b) subjectively, by showing that the defendant had "the malicious intention to cause a deprivation of constitutional rights." *Id.* at 321-322.

In 1982, this Court expanded the qualified immunity doctrine to better serve the goal of protecting public officials by eliminating the subjective prong of the *Scheuer*/*Wood* test. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982). The *Harlow* Court observed that a meritless suit against public officials would cause harm "not only to the defendant officials, but to society as a whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Id.* at 814 (internal quotations omitted). Because subjective good faith is often an issue of fact for a jury, allowing qualified immunity to be defeated by an inquiry into a defendant's subjective motives would increase the risk that a

meritless suit could continue all the way through trial. *Id.* at 815-816. This Court reasoned that removing this risk "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818; *accord Saucier v. Katz*, 533 U.S. 194, 202 (2001) (abrogated in part on other grounds in *Pearson v. Callahan*, 129 S. Ct. 808 (2009)).

Accordingly, *Harlow* reformulated the qualified immunity inquiry so that the only relevant question is whether a public official's conduct was objectively reasonable because it did not violate "clearly established law" at the time of her decision. 457 U.S. at 818; *see also Mitchell v. Forsyth*, 472 U.S. 511, 525-526 (1985) ("The conception animating the qualified immunity doctrine as set forth in *Harlow* . . . is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences'") (quoting *Harlow*, 457 U.S. at 819 (internal quotations omitted)).

Since *Harlow*, the Court's qualified immunity jurisprudence has increasingly focused on the fact that public officials can be paralyzed not only by the fear of meritless suits, but also by the concern that they might unknowingly commit constitutional violations when the governing legal rules are uncertain. In *Davis v. Scherer*, for example, the Court "recognized that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." 468 U.S. 183, 195 (1984); *accord Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity doctrine's

"accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (question of whether applicable law was clearly established at time of alleged constitutional violation must be evaluated based on a specific conception of the violated right, as liability based on a generalized conception would "mak[e] it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages") (internal quotations omitted).

A comparison of the *Connick* rule and the qualified immunity doctrine demonstrates that both carefully balance the rights of individuals to vindicate legitimate constitutional claims against the public's need for assertive and efficient government action. Both seek to give government officials wide latitude in performing their duties in order to minimize costly disruption from courts, even to the extent of shielding such officials when their conduct is not demonstrably justified. *Compare, e.g., Connick*, 461 U.S. at 146-147, 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"), *with Hunter*, 502 U.S. at 229 (qualified immunity doctrine's "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted). And both highlight the damage caused when officials are uncertain about what they can and cannot do in the performance of their duties. *Compare, e.g., Waters*, 511 U.S. at 676, *with Anderson*, 483 U.S. at 639.

C. The Third Circuit's Arbitrary Distinction Between Public Employees' Speech And Petition-Based First Amendment Claims Exposes Public Officials To The Very Interference From Which This Court Consistently Has Sought To Protect Them.

The *Connick* rule's placement in a larger body of law that shields public officers from litigation is not simply a point of academic interest. It highlights the Third Circuit's error in refusing to apply the *Connick* rule to petition-based retaliation claims.

First, in *San Filippo v. Bongiovanni*—the opinion in which the Third Circuit first refused to apply *Connick* to petition claims—the Third Circuit justified its conclusion primarily by distinguishing the First Amendment's Free Speech and Petition Clauses. 30 F.3d 424, 439-443 (3d Cir. 1994). But, even if the Third Circuit's proffered distinctions were valid—we agree with Petitioners that they are not, *see infra*—they do not explain why petition claims are any different from the wide variety of other types of claims against which public officials are protected by qualified immunity.

Second, this Court's caselaw governing qualified immunity makes clear that legal standards for government officials should apply "'across the board,'" rather than in a manner contingent on the employee interests at issue. *Anderson*, 483 U.S. at 642 (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)); *accord Saucier*, 533 U.S. at 203. The plaintiffs in *Anderson* argued that qualified immunity should not apply to Fourth Amendment claims because such claims already implicate "unreasonable" conduct by defendants, or alternatively, that certain subsets of

such claims should be excepted from immunity based on common-law principles. 483 U.S. at 642-645. This Court rejected the plaintiffs' argument, noting that it had in the past "been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Id.* at 642. "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Id.* Because the *Anderson* plaintiffs could not carry the "heavy burden" of justifying why Fourth Amendment claims should be exempted from the qualified immunity doctrine, the Court declined to carve out the proposed exceptions. *Id.* at 642-645; *see also Saucier*, 533 U.S. at 203 (refusing to except excessive force claims from qualified immunity).

The same concerns call for "across-the-board" application of the *Connick* rule. Government employers should not be forced to fine-tune their management of personnel based on "the precise character of the particular rights alleged to have been violated," *Anderson*, 483 U.S. at 642, whether those rights spring from the Speech Clause or the Petition Clause.

Third, the Third Circuit in *San Filippo* held that petition claims are different from speech claims because "when one files a 'petition' one is not appealing over government's head to the general citizenry; when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." 30 F.3d at 441-442. This conclusion

suffers from at least three fatal flaws. First, the Third Circuit's starting premise—that an employee would necessarily be petitioning the *same* government that is employing her—is false: often, for example, a *state* or *local* government employee will petition a *federal* agency such as the EEOC, in which case the employee *is* in fact going over her employer's head. *See, e.g.*, *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 n.24 (3d Cir. 2006) (noting that borough manager's complaint to EEOC would have qualified as petitioning activity). Second, the *San Filippo* court's ruling sweeps too broadly; it is undisputed that employee *speech* directed toward an employer is covered by the *Connick* rule. *See, e.g.*, *Garcetti*, 547 U.S. at 414 (employee disciplined for memorandum directed to supervisors). This undercuts the assertion that *petitions* should be exempt from the *Connick* rule merely because they might be directed at the employer. Finally, and perhaps most importantly, the Third Circuit's carve-out of petition claims "is an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined," an end-run around *Connick* that "would undermine the government's special role as an employer." *San Filippo*, 30 F.3d at 449 (Becker, J., dissenting).[5]

Fourth, the end-run decried by Judge Becker is illogical and pernicious given this Court's decades-old admonition that petition and free speech rights "are

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[5] It is not hard to imagine that the threat of such an end-run would create perverse incentives for government employers to *minimize* their employees' abilities to petition (i.e., by reducing the availability of grievance procedures) so that employers are not susceptible to the very constitutionalization of employee grievances that *Connick* was designed to prevent.

inseparable." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances"); *accord United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (right to petition is "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press"); *Nat'l Ass'n for Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982); *see also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of that Amendment").

Because of their inseparable nature, claims under the Petition and Speech Clauses "are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (citing *Claiborne Hardware*, 458 U.S. at 911-915); *see also Bill Johnson's Restaurants, Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 743 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition") (internal citations omitted); *accord BE & K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 530-531 (2002). Following this precedent, this Court has unequivocally rejected the argument that the Petition Clause has "special First Amendment status." *McDonald*, 472 U.S. at 485. Noting that "[t]he Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," the *McDonald* court held that the right to petition under the First Amendment carries no greater immunity

from defamation suits than the right to free speech. *Id.*

The argument advanced by Respondent is essentially the same as the one rejected in *McDonald*. Like the petitioner in *McDonald*, Respondent asks this Court to recognize his petition rights in a context in which his free speech rights unquestionably would not apply.[6] Respondent's contention fails for the reasons stated in *McDonald*.

The intertwined nature of speech and petition rights renders the Third Circuit's position not only illogical, but also destructive to the legal certainty that government officials need to perform their duties. *See* Section I, *supra*. The line between petitioning and speaking is a blurry one, *see* Pet. Br. 29-34, creating a confusion that is apparent in the inconsistent treatment given to petition claims in Third Circuit decisions citing *San Filippo*. *See, e.g.*, *Hill*, 455 F.3d at 242 n.24 (stating without explana-

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[6] The *San Filippo* court tried to confine *McDonald* to its facts in a footnote, 30 F.3d at 442 n.21, but *McDonald*'s sweeping language belies any such cramped interpretation of its holding. The Third Circuit also expressed concern that application of the *Connick* rule to petition claims would render the Petition Clause redundant of the Speech Clause, *id.* at 442-443, but the consistent application of *Connick*'s limiting rule across First Amendment claims does not render them "redundant" any more than the consistent application of qualified immunity to *all* constitutional claims renders all of the provisions of the Constitution redundant of one another. *See id.* at 450 (Becker, J., dissenting) ("*Inter alia*, the clause would still have use when there is a 'petition,' in lieu of more conventional speech"). Moreover, any overlap between the Speech and Petition Clauses is not due to the whittling away of the Petition Clause, but rather the expansion of the concept of speech to cover most if not all petitioning conduct. *Id.*

tion that "reporting a superior's misconduct to a legislative body when the legislative body is also the reporter's employer" is not petitioning activity); *Foraker v. Chaffinch*, 501 F.3d 231, 237-238 (3d Cir. 2007) (stating that strength of petition rights depend on formality of petitioning channels, and holding that internal grievances did not constitute petitions).

Under *San Filippo*, it is unclear what a public employer should do if an employee submits a complaint about a matter of personal rather than public concern: should the employer consider the complaint to be "speech" or "petitioning"? What if the employee threatens to file a formal grievance in a letter to the employing agency? In these and other such ambiguous situations, the employer's safest course would be to consider itself prohibited from disciplining the employee because there is a chance that the employee's behavior would be considered "petitioning" rather than speech. But this is exactly the kind of decision-making through intimidation that rules such as qualified immunity and the *Connick* rule were meant to prevent. *See Hunter*, 502 U.S. at 229 (qualified immunity doctrine's "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted). In short, the Third Circuit's refusal to apply the *Connick* rule to petition claims undermines the settled interests of government officials long protected by this Court. It should be overturned.

CONCLUSION

For the reasons stated in this brief and in the Petitioners' brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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